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89-23

No. _____

In The

Supreme Court of the United States

October Term, 1988

DR. WAYNE SMITH

Petitioner,

v.

CLEBURNE COUNTY HOSPITAL, *et al.*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals exceed its authority under Rule 52(a), F.R.C.P., when, without *any* reference to Rule 52(a) or to the "clearly erroneous" standard or criteria, it reversed the trial court's findings that the petitioner, a doctor, had his county hospital privileges suspended and later denied in retaliation for his protected speech criticizing hospital officials, where the trial court found, after weighing the evidence, that:

(i) petitioner's speech was substantially accurate, not recklessly made, and would not undermine the working relationships involved;

(ii) petitioner's protected speech was the motivating factor in the suspension and denial of his hospital privileges;

(iii) respondents did not prove that they would have so acted absent the protected speech.

PARTIES

Petitioner is Dr. Wayne Smith. Respondents are: Cleburne County (Arkansas) Hospital; Sam B. Rector; V.H. Dickson; Larry Crabtree; D.E. Barnett; Carolyn Sue Duncan, Executrix of the Estate of Thomas J. Whitaker; B.J. McNair; Oscar Patchell; Rodney A. Peterson; Charles Evans; Elaine Ellibee; Millard Fletcher; Loreen Houston; Vernon H. Wold; Wincle Forest; Roger Morin; Dr. William M. Wells; Dr. Michael E. Barnett; Dr. Max Baldridge; Dr. Nathan L. Poff; Dr. Donald H. McClanahan; Dr. Harrol L. Cranford; Jessie Faye Scruggs, Executrix of the Estate of Dr. Joe B. Scruggs; Dr. Robert Clark; Dr. Steve Blackburn; Dr. Jim Ashabramer; Dr. Robert R. Wilson; and Dr. H.C. Williams.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dr. Wayne Smith, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on March 8, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals, reported as *Smith v. Cleburne County Hospital, et al.*, 870 F.2d 1375 (8th

Cir. 1989), is set forth in Appendix A to this Petition, App. 1-21, *infra*.

The Opinion of the District Court on liability, reported as *Smith v. Cleburne County Hospital, et al.*, 607 F.Supp. 919 (E.D. Ark. 1985), is set forth in Appendix B to this Petition, App. 22-43, *infra*. The Opinion of the District Court on damages/remedy, reported as *Smith v. Cleburne County Hospital, et al.*, 667 F.Supp. 644 (E.D. Ark. 1987), is set forth in Appendix C to this Petition, App. 44-61, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 8, 1989. Appendix D, *infra*. Smith's timely petition for rehearing and suggestion for rehearing *en banc* was denied by Order of the Court of Appeals entered on April 12, 1989. Appendix E, *infra*. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure provides in relevant part:

> Rules 52. Findings by the Court.
>
> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly

> set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

STATEMENT OF THE CASE

On April 26, 1977, petitioner, Dr. Wayne Smith, commenced this action in the United States District Court for the Eastern District of Arkansas. His complaint alleged, *inter alia*, that the defendant Cleburne County Hospital (a government owned and operated facility), members of the hospital medical staff, and members of the hospital board of governors suspended and revoked his medical staff privileges because he engaged in First Amendment protected speech, in violation of 42 U.S.C. §1983. In October, 1981, before the trial, the district court ordered the hospital's Joint Executive Committee to conduct a hearing on whether Dr. Smith should be granted renewed medical staff privileges. The Committee recommended to the hospital's Board of Governors and the Board agreed in November, 1981, that Smith be denied renewed staff privileges. In a second amended complaint Smith alleged this failure to grant him privileges in 1981 was a further retaliation for his exercise of First Amendment rights.

The liability case was heard in a bifurcated trial over four days in September and October, 1983.

Certain basic facts were not disputed. Dr. Smith practiced medicine as a family practitioner in Cleburne

County, Arkansas, commencing in 1968, and was on the medical staff at the hospital, being Chief of Staff for one year in 1973-74. Smith criticized the quality of patient care at the hospital at various times and by 1976 he had discussed his complaints with the medical staff, the Board, the Administrator, citizens of Cleburne County, and the local news media. The allegations concerned failure of the doctors to abide by surgery schedules, poor nursing care, and other care-related matters. After many meetings and escalating public controversy (the details of which are set out in the district court opinion), the medical staff recommended on February 22, 1977, that Dr. Smith's staff privileges be temporarily suspended pending resolution of the controversy and peer review of Dr. Smith. Dr. Smith thereafter declined to participate in hospital activities and filed this lawsuit.

The trial presented conflicting evidence on the critical issues of whether Smith's criticism of hospital officials, particularly the public nature of the criticism, was a motivating reason for both the medical staff's recommendation in February, 1977, that his staff privileges be suspended and the Board's denial of renewed privileges in 1981; whether the medical staff's recommendation followed by Smith's withdrawal from hospital staff activities constituted an involuntary separation of that relationship; whether these actions would have been taken absent Smith's protected speech; and whether Smith's criticisms were false or reckless or would undermine the working relationships involved.

The district court resolved each of these factual disputes in favor of the plaintiff, Dr. Smith. The trial judge found that Smith's criticisms were initially voiced to the

Board, medical staff, and his patients, the thrust being to persuade the Board to obtain a full scale investigation by an independent source into his allegations of declining care, that many Board and staff members, while acknowledging problems at the hospital, were critical of Smith because he did not remain "in-house" with his criticism; that Smith's criticisms were not categorically false or recklessly made, but were substantially accurate, especially in view of findings and recommendations of both the Arkansas Department of Health and the U.S. Department of H.E.W., and were not a basis upon which to question his fitness to serve on the medical staff; that Smith's withdrawal from activities at the hospital was involuntary; that Smith's conduct was the motivating factor in the various defendants' actions denying him staff privileges, including the 1981 Board decision not to reinstate his privileges; that the relationship between Smith and the defendants was not of such a personal and intimate nature that the public criticism would likely undermine the effectiveness of the working relationship; that although the defendants' major concern in seeking to keep the controversy "in house" was the fear that the interest of the hospital would be jeopardized, they in fact made no effort in the 1981 Committee hearing to determine empirically and objectively what harm, if any, had accrued to the hospital or how Smith's reinstatement would cause patient care to diminish; and that the defendants did not demonstrate that they would have denied Smith staff privileges in the absence of the protected speech.

The trial judge therefore held that Smith's speech was constitutionally protected and that his staff privileges had been unlawfully suspended and later permanently denied in retaliation for that protected speech.

After a separate series of hearings on the damages portion of the case, the trial court issued on August 10, 1987, an opinion finding and allocating among the defendants certain damages, in which the court further found, based upon the liability trial evidence, that the 1977 medical staff recommendation that Smith's privileges be temporarily suspended was in essence final and absolute, as the staff was the alter ego of the Board, and that Smith knew this to be true; that the Board never rejected a recommendation from the medical staff regarding staff privileges at the hospital; that the medical staff not only knew that working conditions at the hospital for Smith under such circumstances would be difficult and intolerable, but intended to make conditions intolerable; and that Smith would not have been approved for staff privileges for the 1976-77 period if his behavior, as alleged by defendants, had long been so improper or disruptive to the general welfare of the hospital.

On appeal the Eighth Circuit reversed the finding of liability. Without specifically citing to Rule 52(a), F.R.C.P., or the "clearly erroneous" rule or criteria, the court of appeals found a set of facts substantially in contradiction to those of the trial court. The appellate court found that after the medical staff's recommendation of suspension the hospital reaffirmed his active status and thereafter

Smith failed to comply with certain requirements to maintain staff privileges, therefore rendering his withdrawal from hospital activities voluntary; that Smith's criticisms started out as protected speech but evolved into vindictive, personal animosity and disruptions of public service (with no specification of which speech was protected and which was not and what public service was disrupted); that the purpose of Smith's letters to his patients and to Board members was not constructive criticism but was to economically disrupt the hospital; that the medical staff's own written statement of reasons why they recommended Smith's suspension were in fact the true reasons; that the staff in fact made its recommendation not because Smith's criticisms became a public issue but because they viewed Smith as disruptive and argumentative, and that thus there was "ample evidence to conclude" that numerous and sufficient reasons other than Smith's speech grounded the recommendation. The Eighth Circuit therefore concluded that Smith's speech in unspecified part amounted to economic coercion that goes beyond the scope of constitutionally protected activity and that in any event he was not suspended in retaliation for protected speech. The Eighth Circuit did not state any conclusion as to the constitutionality of the 1981 Board denial of Smith's application for renewed privileges.

A timely petition for rehearing and suggestion for hearing *en banc* was denied on April 12, 1989.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case is another object lesson in the problems that arise when an appellate court wholly ignores the limited scope of review established by Rule 52 of the Federal Rules of Civil Procedure and emphatically laid down by this Court in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). The *de novo* fact finding by the court of appeals is apparent from the face of the opinion, which does not even attempt to pay lip service to Rule 52(a), the "clearly erroneous" rule or its criteria, or *Anderson*. Indeed, the court of appeals' major conclusion regarding the factual issue of whether the medical staff would have acted as it did absent Smith's speech is stated:

> *There is ample evidence to conclude* that the medical staff found other numerous and sufficient reasons for voting to recommend that Smith's privileges be temporarily suspended.

(Appendix A, App. 20)(emphasis added).

The court of appeals has utilized its *de novo* factfinding in an important First Amendment context to reverse the trial court's conclusion that a doctor who took the unusual step of criticizing the health care standards of a government hospital and hospital officials was the subject of retaliation by hospital officials on account of that criticism. The Eighth Circuit simply pronounced findings of fact as would a trial court, findings at polar opposite from the trial court on virtually all the critical factual issues in the case. The appellate court "never identified the standard of review that it applied to the District Court's factual findings" and never discussed "its obligations under Rule 52(a)." *Amadeo v. Zant*, ___ U.S. ___, 108 S.Ct.

1771, 1777 (1988). Dr. Smith's First Amendment rights have thereby been decided by naked appellate *de novo* factfinding. This Court should grant this petition for certiorari in order to uphold the authority of *Anderson* and of this Court to establish uniform and binding interpretations of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 52(a) provides in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In *Anderson* this Court set forth certain general principles governing the exercise of an appellate court's power to overturn, as "clearly erroneous," factual findings of a district court. The appellate court must be left with the definite and firm conviction that a mistake has been committed, and is not entitled to reverse the trier of fact simply because it is convinced that it would have decided the case differently. 470 U.S. at 573. The appellate court cannot duplicate the role of the lower court. Where the district court's account of the evidence is plausible in light of the record viewed in its entirety, and where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Id.* at 574. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. The trial on the merits should be the "main event" rather than a "tryout on the road." *Id.* at 575.

And when findings are based upon determinations regarding the credibility of witnesses, the "clearly erroneous" rule requires even greater deference to the trial court's findings, for only a trial judge can be aware of variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said.

The trial judge's major role is the determination of fact. Duplication of that role is not warranted. The parties having already been forced to concentrate their energies and resources on persuading the trial judge that their factual account is correct, "requiring them to persuade three more judges at the appellate level is requiring too much." *Id.*

Application of the foregoing principles to the instant case reveals at once not simply that the Eighth Circuit wrongly applied these principles to the facts but that the Eighth Circuit did not even purport to apply these principles. The appellate opinion is devoid of any mention of Rule 52(a), *Anderson*, the "clearly erroneous" rule, or the principles of application of that rule set out by this Court in *Anderson*. The appellate opinion reads like a trial court opinion with respect to the critical factual findings in the case.

This Court's power of supervision should be exercised to correct the appellate court's wholesale avoidance of Rule 52(a) and to prevent appellate courts from simply disregarding the principles of the "clearly erroneous" rule set forth in *Anderson*. Without identification and discussion by the appellate court of its obligations under Rule 52(a), and without some reasoned application of

those principles to the facts, the "main event" becomes indeed a mere "tryout."

It is impossible to state here all of the record evidence lying behind each trial court finding of fact and the commensurate lack of evidence justifying an appellate conclusion that the trial court's findings were clearly erroneous. Although the district court could have been more precise about the bases for its factual conclusions, any lack of precision "is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding." *Amadeo v. Zant, supra,* 108 S.Ct. at 1780. The court of appeals' wholesale denigration of the First Amendment rights of Dr. Smith through its refusal to be bound by Rule 52(a) and *Anderson* is demonstrated by certain key factual findings made by the appellate court, which constitute, under Rule 52(a) and *Anderson,* impermissible *de novo* factfinding.

It must be noted that the appellate court recited that the record in this case is "voluminous and extensive." (Appendix A, App. 20). But the liability hearing only lasted four days in 1983, compared with eight days for the separate, bifurcated damages hearing. None of the extensive damages evidence was admitted for any purpose going to liability. The appellate court, however, impermissibly but without acknowledgement relied upon all the evidence in making its *de novo* fact findings, as will be reviewed below.

The trial court found that, in retaliation against Smith's speech and against his refusal to keep his criticisms "in house," the medical staff, through its recommendation that Smith's privilege be suspended, made

conditions intolerable for Smith and *specifically intended* to make conditions intolerable for Smith, that his subsequent withdrawal was therefore involuntary, and that the medical staff recommendation was in fact the equivalent of a final hospital action, as the Board never went against the staff on a medical privileges issue.

The liability trial evidence supported the trial court findings. For instance, one of the medical staff member authors of the 1977 resolution recommending Smith's suspension testified that Smith's accusations "created in me a tremendous urgency and a sense of need to retaliate – to, maybe retaliate is not a good word, but to state my position. . . ." (T. 10/3/83, 31-32). And in an October, 1976 "off the record" medical staff meeting, uncontradicted liability trial evidence established that all the doctors in attendance told Smith he should not discuss the hospital's problems outside the hospital, and two doctors (later to be two of the four authors of the 1977 resolution) told Smith he would be ruined economically if he did not stop talking publicly about the hospital's problems, though all of these doctors agreed with Smith that the hospital had problems (T. 9/29/83, 62-71). Smith cited these threats in a letter to the Board in November, 1976 (PX-76). And further, one of the doctors who sat on the 1981 committee hearing, in testifying that the committee had considered the issue of whether Smith had, in effect, been forced to withdraw from the hospital, further testified in response to a question from the trial court concerning constructive revocation as to anything that would have caused Smith to withdraw:

> Again, just looking specifically at what we saw there, there was apparently a marked difference of opinion

> as to how these problems should be managed and were managed. This, to me, would create a marked element of friction. This would have been a highly emotionally charged atmosphere on a day to day basis in the hospital, and it would be difficult for, I imagine, Dr. Smith or any other of the physicians to function adequately at that time. I would have had trouble, knowing that every time I walked down the hall somebody, you know, was criticizing me. This appears to be what we saw with this.

(T. 10/3/83, 101-02).

The Eighth Circuit, however, found that the hospital, through the medical staff's recommendation of suspension, did not render Smith's working conditions intolerable, but instead reaffirmed to him that he was still a member of the active medical staff, after which he continued to voluntarily withdraw from hospital activities. The appellate opinion merely states that "[t]here is nothing in the record which would suggest that the Hospital tried to create intolerable working conditions in order to force Smith to quit" (Appendix A, App. 13) when in fact the trial court's finding in this regard of necessity is based on the credibility and demeanor of the medical staff witnesses who testified about the controversy and their actions in recommending Smith's suspension. The trial court's very strong and explicit finding that the staff's recommendation not only created an intolerable situation but was intended to do just that cannot be lightly regarded. The appellate court here engaged in *de novo* fact finding, without so much as a *pro forma* reference to Rule 52(a) or its underlying principles.

As to the voluntariness of Smith's later cessation of activity, the appellate opinion again engages in *de novo*

factfinding, as the evidence sharply conflicts on the various issues cited by the appellate opinion. While the Eighth Circuit did not discuss any of the evidence in Smith's favor on this point, the entire issue is not necessary to a resolution of the case, inasmuch as the trial court's finding of the medical staff's motive in its creation of an intolerable situation renders moot, in Smith's favor, the issue of his later actions, while the appellate court's contrary findings that the medical staff's motives were other than retaliation for Smith's speech renders moot, in the hospital's favor, that issue of his later actions.

With regard to the critical factual issues of the manner and effect of Smith's criticisms, the trial court, in holding that Smith's speech was protected as a matter of public concern, found that the speech was substantially accurate, was not reckless, and would not undermine the working relationships involved. The appellate court, however, found that the *purpose* of Smith's speech was not to constructively criticize the hospital but was a disparaging personal attack "written for the ultimate purpose of economically disrupting the Hospital." (Appendix A, App. 17) The appellate court here again engaged in *de novo* factfinding, without so much as a passing reference to Rule 52(a) or its principles. This finding itself would be clearly erroneous if made by the factfinder inasmuch as a member of the medical staff upon specific inquiry by the trial court testified uncontradicted that Smith sincerely and in good faith publicly criticized the hospital's patient care and that he did not make those criticisms to deliberately damage the hospital. (T. 10/3/83, 80-81). Furthermore, the hospital's attorney at the commencement of the trial upon specific inquiry by

the trial court stated that the hospital would not be able to attribute the hospital's continuing declining income to Smith's public criticisms (T. 9/28/83, 23-25). Indeed, the evidence at trial established that the hospital had been losing patients since 1974 due to competition, government regulations, and overly efficient patient screening (PX-17, 21, 67, 84, 85, 122, 127).

Finally, the appellate court's "finding" that "[b]ecause Smith had one of the largest patient loads in the Hospital, the economic effect of Smith quitting the Hospital would surely be felt" is an example of *de novo* factfinding based on the damages trial evidence; there is no evidence in the liability trial record that Smith had one of the largest patient loads in the hospital.

This *de novo* finding of an ulterior motive by Smith to economically disrupt the hospital seems to have also caused the appellate court to dispense with any further review of or comment upon the trial court's findings that the speech was substantially accurate and did not impermissibly damage the relevant working relationships at the hospital. The appellate court apparently found this ulterior motive in the personal and caustic nature of some of Smith's criticisms, which characteristics in themselves have been held not to remove speech from the protection of the First Amendment, *e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Eighth Circuit found that by the time of the medical staff's 1977 recommendations there was a long history of conflict between Smith and various hospital administrators, Board members, nursing staff, and other personnel (Appendix A, App. 19). With no further discussion of the evidence or Rule 52(a), this *de novo* finding apparently is to be taken

as reversing the trial court's distinctly different and more relevant finding that the effectiveness of the working relationships would not likely be undermined by Smith's public criticisms. This finding is supported by the obvious undisputed fact that the Board and staff purported to want Smith to return to active practice at the hospital in March, 1977. There was no evidence introduced in the liability trial that Smith's criticisms undermined or would undermine the working relationships involved.

As to the accuracy of Smith's criticisms, the trial court cited to Plaintiff's Exhibit 125, detailing a substandard level of care in the hospital's emergency room during periods over the course of over a year. (Appendix B, App. 36-37 n.7). Also cited were critical reports from the Arkansas Department of Health and the federal Food and Drug Administration, the former of which concluded that the deficiencies cited "should be corrected at the earliest possible date in order to provide maximum care and/or safety to the patients in your hospital." (Appendix B, App. 32-33). The appellate court recited that the ADH considered the amount of deficiencies were not unusual for a hospital of comparative size and found the hospital and its staff were dedicated to patient care and safety, but this appellate *de novo* finding comes directly from newspaper article exhibits that were not admitted for the truth of the matter contained therein. (PX-117, 120; T. 9/28/83, pp. 55-60).

With regard to the critical factual issue of whether Smith's speech was the cause of the suspension of, and eventual denial of, his privileges, the trial court found that Smith's speech was the substantial motivating factor

in the 1977 medical staff recommendation of suspension as well as the 1981 Board's refusal of staff privileges. As to the 1977 staff recommendation, evidence supporting the district court's finding consisted of Smith's testimony about the threats made to him, as well as staff member testimony about their roles in the controversy, some of which is referenced above. For instance, the medical staff published a statement in the local newspaper in late December, 1976, directed at Smith, which pledged that the doctors would try to cure problems by working within the organization, not by withdrawing from it. (PX-86). One of the doctors who was later an author of the February, 1977, recommendation to suspend Smith testified that the meaning of this staff statement was that the hospital's faults should be discussed in-house among the doctors and administration rather than in public. (PX-204, p. 12). Furthermore, in a January, 1977, medical staff meeting, two doctors (later to be two of the authors of the suspension recommendation) stated that problems at the hospital existed which needed correction but Smith's method of correction was wrong because he was going public and not staying within the hospital (PX-100, pp. 2-6).

The appellate court, however, simply adopted without discussion or reasoned explanation what it labeled as the hospital's own prepared statement on the reasons for the medical staff's 1977 recommendation (Appendix A, App. 17-18), again without reference to Rule 52(a) or its underlying principles. The prepared statement in fact was written by four medical staff members, three of whose credibility the trial court had the opportunity to judge from their testimony at trial, and whose testimony amply

demonstrated that the reason for the resolution was Smith's *public* criticisms of the hospital's standard of patient care. On this critical point the appellate opinion could hardly be more clear in its *de novo* factfinding, concluding that

> There is ample evidence to conclude that the medical staff found other numerous and sufficient reasons for voting to recommend that Smith's privileges be temporarily suspended.

(Appendix A, App. 20).

The appellate opinion here demonstrates no application whatsoever of the principles of Rule 52(a). The appellate court simply accepted the prepared statement's assertion that Smith's privileges were suspended because the medical staff viewed his behavior over a period of three to four years as disruptive and "argumentative." The trial court, however, found that if Smith's behavior had been for so long so improper or disruptive neither the medical staff nor the Board would have approved his staff privileges for the 1976-77 fiscal year. The appellate court substituted its view of the facts for that of the trial court regarding the motive of the medical staff, without so much as an attempt to paint its finding as anything other than the way it would like to read the cold record.

The appellate court did not address at all the trial court's finding that the 1981 Board denial of Smith's privileges – with its accompanying lack of effort objectively to determine any harm caused to the hospital by the past controversy or to be caused by Smith's reinstatement – was simply a reaffirmance of the hospital officials' resistance to Smith's exercise of his First Amendment rights. That finding is predicated upon an extensive

review of the 1981 hearing, in which numerous references and concerns were expressed as to Smith's past *public* criticisms. But the appellate court "reversed" that factual finding by ignoring it.

Finally, the trial court concluded that the hospital officials did not meet their burden to prove that they would have taken the same action absent Smith's speech. The appellate court, however, in applying the various factors to be weighed in the balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), again without reference to Rule 52(a) or its criteria announced the *de novo* finding that Smith's criticisms were a calculated and long maintained effort to disrupt the hospital economically, and thus that the medical staff had substantial reasons to recommend Smith's suspension other than retaliation against his protected speech. Other than the 1977 resolution itself, however, there was no evidence at the liability trial to meet the defendants' burden to prove that the same action would have been taken absent Smith's speech.

The appellate subsidiary fact findings, all of which were made without regard to Rule 52(a), thus foreclose any favorable legal analysis for Smith under *Pickering* and its progeny. By undertaking to duplicate the role of the trial court and decide the case differently when the evidence on various factual issues could point either way or, indeed, only Smith's way, especially in view of the credibility determinations necessarily involved in many of these findings, the appellate court has flouted Rule 52(a) and this Court's decision in *Anderson*, thereby depriving Smith of his First Amendment rights.

CONCLUSION

Smith submits that the unbridled refusal by a court of appeals even to recite to or attempt to apply the Federal Rule of Civil Procedure most directly governing its task is no harmless transgression. The court of appeals in the instant case has effectively rendered a trial court opinion and has proven the district court trial to have been a mere "tryout" rather than the "main event." Accordingly, because substantial questions affecting the uniform application of the Federal Rules and this Court's authority to interpret those rules are involved, a writ of certiorari should issue for review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2587
No. 87-2620
No. 87-2621
No. 87-2622

Dr. Wayne Smith, Appellant, v. Cleburne County Hospital, et al., Appellees.	* * * * * * * * *	On Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: November 14, 1988
Filed: March 8, 1989

Before McMILLIAN, BOWMAN, Circuit Judges, and BOGUE,* Senior District Judge.

BOGUE, Senior District Judge

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*THE HONORABLE ANDREW W. BOGUE, United States Senior District Judge for the District of South Dakota, sitting by designation.

Plaintiff Dr. Wayne Smith brought this action under 42 U.S.C. § 1983 alleging that defendants Cleburne County Hospital, members of the Hospital medical staff, and members of the Hospital Board of Governors, terminated his medical staff privileges because he engaged in First Amendment protected speech. After prevailing on the liability phase of a bifurcated court trial, *Smith v. Cleburne County Hospital*, 607 F. Supp. 919 (E.D. Ark. 1985), Smith now appeals from the district court's failure to award him compensatory damages for lost income, for the loss of business interest, and for failing to mandate that defendants pay for his retraining costs. All defendants cross-appealed the district court's liability finding. It is upon the liability finding that we reverse.

BACKGROUND

A general overview of the relevant facts will be given in this section with further specific facts presented in the discussion section of this opinion as required. The Cleburne County Hospital is owned and operated by Cleburne County, Arkansas. The business affairs of the Hospital are under the supervision of an eight member Board of Governors who are appointed by the County Judge. The County Judge is a non-voting ex officio member of the Board.

In 1968, Dr. Smith submitted a written application to the Hospital for medical staff privileges. Pursuant to Hospital and medical staff by-laws, a doctor's application for medical staff privileges is reviewed by the medical staff, and if the medical staff finds that the applicant has met its established criteria for qualifications, then the medical staff recommends to the Board of Governors that

the doctor should be extended privileges. According to this procedure, Smith was given privileges as a member of the active medical staff which allows for the unlimited admissions of his patients. However, active medical staff privileges were contingent upon the assumption of performing rotating emergency room coverage, attending regular medical staff meetings, and submitting a written application annually for renewed staff privileges. Smith began to criticize the quality of patient care at the Hospital, citing perceived problems in nursing, dietary services and the nursery. By July 2, 1976 Smith's criticism of the Hospital's shortcomings prompted his notification of the Hospital Administration that he had no alternative but to resign from the staff. As of that date Smith ceased scheduling surgery at the Hospital and began referring patients to other hospitals.

Smith was unhappy with the Hospital Administration's response to his criticisms and found it necessary to address a letter to his patients on November 22, 1976 indicating that due to the lack of his expected level of patient care he was quitting using the Hospital in the near future. On the same day, Smith also addressed a different letter to the Board of Governors criticizing them as political flunkies and stated he was concerned that the negligent care at the Hospital would cause a person to die which only then would make them realize that problems exist. Furthermore, he called for a full investigation of his complaints and indicated that if the investigation showed that he was the problem, and not the reasons for his criticisms, then he should not be allowed to remain on the medical staff. This letter was made available to his patients.

Smith met with the Board of Governors to discuss the Hospital's problems in December of 1976. As a result of this meeting, the Board requested the Arkansas Department of Health (ADH) on December 20th to conduct an inspection and survey of the Hospital facilities and the quality of patient care. Again, Smith was unhappy with this response given to his criticisms and on December 29th, he wrote personal letters to various Board members calling for their resignations because in his view they were arrogant, indifferent, failed to learn their duties and perform them, and that they held contempt toward concerned citizens. Additionally, Smith wrote to the ex officio member of the Board, the County Judge, specifically attacking the competency of the Hospital Administrator and indicating that he felt the competency of the Hospital Administrator and indicating that he felt the biggest problem involving the Hospital was the desire on the part of some doctors to be thought of as gods.

At a regular medical staff meeting on January 3, 1977 Smith gave further response to the Board's proposal to have the ADH conduct an investigation by indicating that the only opinion capable of determining whether or not patients were getting adequate care was his. Thus, if an investigation was made and the Hospital was found to have adequate nursing care, then he would still be unable to live with his conscience and would resign.

On February 1, 1977 the ADH submitted the results of their investigation of Cleburne County Hospital. There were a total of fifteen deficiencies found by the Department's survey team which were in noncompliance with Arkansas' regulations for hospitals. Items which were found deficient included the preparation of food too far

in advance of the meal to be served; incorrect water temperatures for pot washing; outdated cartons of milk; phone orders by physicians were not co-signed within 24 hours; outdated drugs were found; some controlled substances were not in locked storage; incomplete pharmacy records; pharmacy stop-orders were not being followed; irregular pharmacy staff meetings were held; improper wiring on some medical equipment was found; corridors were sometimes obstructed with infant cribs, stretchers and crash carts; L.P.N.'s were used as circulating nurses during deliveries rather than R.N.'s; and refrigerators storing blood needed to be monitored. However, it should be noted the ADH considered the amount of deficiencies were not unusual for a hospital of comparative size and found the Hospital and its staff were dedicated to patient care and safety.

Having found the investigation conducted by the ADH unsatisfactory, Smith announced his candidacy for County Judge, since the County Judge appoints the members of the Hospital's Board of Governors, on February 9, 1977. The election was to be held in November of 1978. Smith considered that he needed such an early announcement prior to the election because he felt that the Hospital may not be open at the time of the election due to existing financial mismanagement, and he also felt it was time to take the issues concerning the Hospital to a political platform. In his announcement,[1] Smith criticized

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[1] The following is a prepared statement released to the press:

(Continued on following page)

the Board of Governors, the County Judge, the medical staff, the Hospital Administration, and the nursing staff implicating that they collectively contributed to a "rotten political mess" involving petty, corrupt politics with motives similar to crooks, thieves, cheats and robbers. Smith further called for the resignation of the Board.

(Continued from previous page)

Things are in a turmoil, our hospital is going broke and nothing is being done. I'm running for county judge and will be asking these and other questions.

1. Why does the County Judge refuse to say publicly what he says privately?

2. Why has the Board refused to investigate very specific allegations?

3. Why does the Board not supervise the hospital as it should?

4. Why does the Board allow the County Judge to run business that is supposed to be the province of the Board?

5. Why does the Board refuse to supervise the medical staff as it should?

6. Why does the Board not wish the residents of the county to know what goes on?

7. Why does the Board tell residents of the county that the hospital problems are none of their business?

8. Why did the Board hire a man for administrator who is totally without qualifications for the job?

9. Why do these men insist on remaining on the Board when they obviously aren't doing their job?

(Continued on following page)

(Continued from previous page)

10. Why does the administrator insist on staying with the job when he obviously isn't doing the job?

11. Why has the Board become synonymous with Cleburne County Politics, leaving out the [Greer's Ferry] area?

12. Why does the medical staff not act like a medical staff?

13. Why does the medical staff accept pay from the hospital from E.R. coverage, yet not want to cover it?

14. Why can't the nurses be indoctrinated and properly trained?

15. Why do my critics not speak up officially and do something about me, if I'm so wrong?

16. Why do citizens of the county not speak up?

17. Why do I call this a rotten political mess?

Because it is the kindest thing I can say about the judge, Board, administrator and other doctors. If I don't attribute this to petty, corrupt politics, then what motive may I use? Are they crooks, thieves, cheats, robbers, or what?

I think some changes need to be made, and resignation of the Board members (excluding the new member, Mr. Steward) and administrator would be in order now. They haven't been big enough to do what they should before, so I don't really expect it now. I will be busy in coming weeks telling of their failures and intolerable attitudes.

The hospital is my basic reason for attacking, but my adversary is a rotten political machine. Many in the county have expressed similar views, and I will be actively seeking their support. Every expression of support will be considered a vote for good hospital care of our sick.

After concluding that the investigation conducted by the ADH did not support Smith's claim of improper patient care, the medical staff unanimously recommended to the Board of Governors on February 22, 1977 that the Board temporarily suspend Smith's staff privileges pending further investigation by the Arkansas Medical Society. The medical staff specifically disagreed with Smith that the staff physicians operated deceptively and wholly for self-interest. They also disagreed that the overall patient care was poor or that the medical staff was substandard. Furthermore, because of Smith's request that a full investigation be made and the fact that the ADH's investigation did not support Smith's criticisms, the medical staff determined to make their recommendation to the Board in response to Smith's claim on November 22, 1976 that if an investigation demonstrates that he was the problem, and not the reasons for his criticisms, then he should not be allowed to remain on the staff.

In response to the medical staff's recommendation, Smith wrote a letter on February 25, 1977 to the Hospital Administrator stating:

> In view of the allegations made by the medical staff, I feel I have no choice but to cease hospital activity until these matters are settled. I have patients in the hospital at this time and will discharge them when they are ready to go and plan no further admissions with the possible exception of an OB patient or possibly two.

Smith admitted no patients to the Hospital after this date, and further refused to comply with rotating emergency room coverage assignments.

The Hospital Administrator responded to Smith's letter on March 14, 1977 by indicating that he understood Smith's letter as a letter of resignation and would forward it as such to the Board of Governors. Smith responded by letter on the same day that he had not resigned from the active medical staff. On March 17th, the Hospital Administrator responded to Smith by letter on behalf of the Board:

> As the Board of Governors considers you to be an active member of the medical staff of Cleburne County Hospital, I have been instructed to remind you of the responsibilities a physician must accept to retain this privilege. Of course, this includes emergency room coverage.

This letter was submitted to Smith after a Board of Governors' meeting was held on March 16th where the Board additionally voted to appoint a Joint Committee comprised of some members of the Board and the medical staff to consider further the medical staff's recommendation concerning Smith. Accordingly, Smith responded to the Hospital Administrator on March 18, 1977 that upon advice of his attorneys he would not be actively participating in Hospital activities.

On March 24, 1977 the Joint Committee decided to formally request the Professional Relations Committee of the Arkansas Medical Society to investigate and, if possible, mediate the controversy between Smith on the one hand, and the Board and medical staff on the other. After investigation during the following months, the Arkansas Medical Society viewed the controversy as a personality conflict and elected not to participate in further investigation or mediation.

An executive committee meeting of the medical staff officers met for normal business on July 5, 1977. In addition to other business items, the executive committee noted that Smith had missed more than four medical staff meetings and as a result, according to by-laws, placed himself off the active medical staff and on the courtesy medical staff. As a courtesy medical staff member, Smith could not admit more than six patients per year and held no other staff privileges. No response from Smith was made to this change in medical staff status.

Because the Hospital's fiscal year ended at the end of September of every year, each medical staff member was required to submit a yearly application for renewed medical staff privileges prior to the last Board meeting of the current fiscal year. Correspondence from the Hospital addressed to Smith indicated that he needed to complete the required forms regarding reappointment and return them by August 20, 1977. No forms, letters, or notice was made by Smith to the Hospital of his intent to obtain reappointment to the medical staff.

No further action was taken by the Hospital or the Board of Governors until the Hospital's Joint Executive Committee on October 14, 1981 was ordered by the district court to conduct a hearing on whether Smith should be granted renewed medical staff privileges. This hearing was held to allow Smith to exhaust his administrative remedies before a trial on the merits could be heard. The Joint Committee concluded that Smith's continued criticisms were detrimental to the public purpose the Hospital performs. Additionally, they also found that the personality conflicts between Smith and the medical and nursing staffs would disrupt the efficiency of the Hospital

if Smith's staff privileges were restored. Accordingly, the Joint Committee unanimously recommended to the Board that Smith be denied renewed medical staff privileges.

DISCUSSION

The district court found that Dr. Smith's medical staff privileges were constructively revoked in retaliation for his engaging in First Amendment protected speech on matters of a public concern. *Smith v. Cleburne County Hospital,* 607 F. Supp. 919, 927 (E.D. Ark. 1985). We are unable to agree because Smith was not constructively denied medical staff privileges, but rather voluntarily chose to withdraw from participating in required Hospital activities necessary to maintain his status on the active medical staff. Furthermore, while certain aspects of Smith's speech were constitutionally protected activity, not all of his activity was such, and thus the protected activity engaged in was not a substantial or motivating factor in the action taken against him.

A. *Constructive Discharge*

On February 22, 1977 the medical staff, in accordance with Hospital by-laws, unanimously voted to recommend to the Board of Governors that Smith's staff privileges be temporarily suspended pending further investigation by the Arkansas Medical Society. The medical staff was prompted at this time to make such a recommendation for two reasons. First, the full investigation called by Smith was conducted by the Arkansas Department of Health (ADH). The results of their investigation indicated that indeed there were problems but they did not rise to the level of problems Smith was suggesting. Second,

Smith indicated to the Board on November 22, 1976 that once a full investigation was made and if he was found to be the problem then he should not be allowed to remain on the staff. The medical staff on February 22, 1977 believed that the ADH report vindicated the Hospital against Smith's claims. As such, they felt Smith should be temporarily suspended pending a peer review of his conduct by the ethics committee of the state medical society.

The facts as outlined in this opinion lead us to the conclusion that once Smith received a reaffirmation from the Hospital Administrator that he was still a member of the active medical staff, he was obligated to fulfill the conditions of his staff privileges. Smith refused to comply with these requirements. Additionally, as the facts indicated, Smith also failed to submit the required forms at the end of the Hospital's fiscal year for reappointment to the medical staff.

Although Smith and the other medical staff doctors were not employees of the Hospital receiving a salary, their conduct and their practice of medicine was within the parameters of the Hospital's legitimate interest in promoting the efficiency of the public service it performs. A state operated hospital has the right, and the duty, to regulate the conduct of its medical staff and in maintaining the quality of medical care delivered to its patients. *Daily v. Sprague*, 742 F.2d 896 (5th Cir. 1984). The Hospital afforded every opportunity to Smith to comply with the necessary requirements to maintain his staff privileges. By his inaction in assuming these duties, Smith voluntarily withdrew from the Hospital.

A constructive discharge would occur only if the Hospital rendered Smith's working conditions intolerable in order to force him to quit. *Southside Public Schools v. Hill*, 827 F.2d 270, 274 (8th Cir. 1987). There is nothing in the record which would suggest that the Hospital tried to create intolerable working conditions in order to force Smith to quit. In fact, it is abundantly clear that the Hospital and its staff tried to accommodate Smith as much as possible as demonstrated in their continued efforts to enable Smith to maintain his privileges. Additionally, it is noteworthy that the Joint Executive Committee did not take official action against Smith until the court ordered a hearing in 1981. Under the facts of this case, we believe the Board of Governor's and the Hospital's restraint is admirable.

We hold that a state hospital has the right to regulate the requirements of physicians to obtain and continue to maintain medical staff privileges as a legitimate interest in promoting the efficiency of the public service it performs. As such, the Hospital had the right and the duty to extend medical staff privileges to any doctor fulfilling the necessary requirements for holding staff privileges according to the Hospital by-laws. Once a doctor refuses to comply with these necessary requirements, then the doctor voluntarily withdraws from his association with the Hospital. The fact that the Hospital reaffirmed Smith's medical staff privileges in order to dispel any perception that Smith no longer held privileges, clearly refutes Smith's claims that he suffered a constructive revocation of privileges.

B. *First Amendment Analysis*

Dr. Smith, as a member of the active medical staff of Cleburne County Hospital, was an independent contractor rather than a salaried employee of the Hospital. However, the Hospital, as a public institution, has the right to regulate its medical staff in order to insure the delivery of adequate medical care to its patients. *Daily v. Sprague*, 742 F.2d 896 (5th Cir. 1984). According to the Hospital's bylaws, not only were there established guidelines in determining the competency of new applications to the medical staff, but also there were guidelines for existing staff members to follow in order to maintain their privileges. While there is not a direct salaried employment relationship, there is an association between the independent contractor doctor and the Hospital that have similarities to that of an employer-employee relationship. For instance, there is an application process for privileges, there are required duties to be performed by both parties, and there are potential liabilities each party is responsible for jointly and severally for tortious conduct. As a result of these similarities, the application of the *Pickering* balance test and its progeny in this case is appropriate and will be discussed below.

Smith initiated this action on April 26, 1977 alleging that the defendants terminated his medical staff privileges because he engaged in First Amendment protected speech. The inquiry into whether speech is constitutionally protected is a question of law. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983); *Paterson v. Johnson*, 721 F.2d 228 (8th Cir. 1983). A court must first consider whether the speech addresses a matter

of public concern in order to be constitutionally protected. This determination is made by a review of the content, form, and context of the speech. *Connick*, 461 U.S. at 148-49; *Accord Rankin v. McPherson*, ___ U.S. ___, 107 S. Ct. 2891, 97 L. Ed.2d 315 (1987).

It is clear that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick*, 461 U.S. at 146, 1035 S. Ct. at 1689, (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 3426, 73 L. Ed.2d 1215 (1982)). However, when there is a conflict between speech upon matters of a public concern and the legitimate interest of a public institution in promoting the efficiency of the public service it performs, a balance between this conflict is required. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 285, 97 S. Ct. 568, 574, 50 L. Ed.2d 471 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968).

Smith's suit challenged that he was wrongfully terminated from the Hospital's medical staff because he engaged in First Amendment speech. Courts reviewing challenges to discharges based on constitutionally protected speech apply a three-step analysis. *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987) (citing *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 643 (8th Cir. 1983)). The Court must determine whether (1) the plaintiff has carried the burden that he or she engaged in constitutionally protected activity, *Pickering*, 391 U.S. at 569-72, 88 S. Ct. at 1735-37; (2) by engaging in such activity the plaintiff can show that it was a substantial or motivating factor in the action taken against him or her, *Mt. Healthy*, 429 U.S. at 285-87, 97 S. Ct. at 575-76; and (3)

can the defendant refute plaintiff's claim by demonstrating that the same action would have been taken in the absence of the protected activity, *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 416-17, 99 S. Ct. 693, 697-98, 58 L. Ed.2d 619 (1979); *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576.

Under the first step of analysis, where Smith must show that he engaged in protected speech, the district court was persuaded that Smith's criticisms were shown to be substantially accurate, as demonstrated by the report submitted by the Arkansas Department of Health. Due to the nature of the complaints, the district court was correct in determining that some aspects of Smith's complaints were a matter of public concern, at least as they were initially made. However, it is clear in the record that Smith's criticisms, when viewed in their cumulative effect, evolved into statements of personal animosity against specific people and further evolved into a pattern of disrupting the public service the Hospital performs. Smith went beyond the scope of protected speech when his criticisms became caustic personal attacks on almost every person connected with the Hospital ranging from the County Judge (as ex officio Board member) to staff personnel. These attacks were vindictive and personal, and as such, are not a matter of public concern.

For instance, Smith began writing letters to his patients and to the Board of Governors in late 1976 claiming that the Hospital could not provide patients with a level of care he feels they should receive. From Smith's view, this was because the Board of Governors were political flunkies who were arrogant, indifferent, failed to learn their duties, and held contempt toward concerned

citizens. The purpose of these letters was not to constructively criticize the Hospital, which is a constitutionally protected activity of a matter of public concern. Instead, the letters were disparaging personal attacks against various people written for the ultimate purpose of economically disrupting the Hospital.

Under the second part of the three-step analysis, Smith must show that the Hospital revoked his medical staff privileges for the substantial or motivating reason that he engaged in protected speech. The district court was persuaded that Smith's revocation of privileges was the direct retaliatory result that the controversy between Smith and the Hospital did not remain "in-house" and became a public issue. As a result of the controversy becoming public, the district court believed that Smith's public speech on the controversy was the motivating factor in the revocation of his privileges.

Smith's initial criticisms of the Hospital indeed became a matter of public concern and was given press coverage from the local newspapers. However, when the medical staff unanimously voted to recommend that Smith's privileges be temporarily suspended pending a peer review, the Hospital's prepared statement indicated that it was Smith's disruptive attacks on various individuals over a period of three to four years, even though some of these attacks were publically made, which were one of the considerations in the medical staff's recommendation. The prepared statement even went on to further state the medical staff's other reason for recommending temporary suspension. For instance, it pointed to the financial impact on the Hospital the controversy created; the low morale as a result of Smith's

direct attacks on various nurses; the continued disagreement with Smith that the medical staff does not operate deceivingly and wholly for self-interest; the continued disagreement with Smith that the medical staff itself is substandard; and that the Department of Health's investigation did not support the nature of his criticisms.

The fact that Smith's initial criticisms became a public issue alone is insufficient in Smith's burden to show a causal connection that his public speeches were a substantial or motivating factor for the Hospital's alleged revocation of his privileges. Merely because the criticisms became a public issue was not the reason the medical staff voted to recommend that Smith's privileges be temporarily suspended. Instead, it was because the medical staff viewed Smith's behavior over a period of three to four years as disruptive and argumentative.

The third step of analysis in reviewing challenges to discharges based on constitutionally protected speech is whether the defendants can refute Smith's claim by demonstrating that the same action would have been taken in the absence of the protected activity. Within this analysis, the *Pickering* balance test requires the balancing between the interests of the person engaged in protected speech on matters of public concern and the interests of the public institution in promoting the efficiency of the public service it performs. *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734; *see also Lewis v. Harrison School Dist.* 805 F.2d 310, 313 (8th Cir. 1986) *cert. denied* 107 S. Ct. 2481 (1987). In applying the *Pickering* balance test, factors to be weighed include (1) the need for harmony in the office or workplace (or hospital); (2) whether the public institution's responsibilities require a close working relationship

between the plaintiff and co-workers when the speech engaged in has caused or could cause the relationship to deteriorate; (3) the time, manner and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the person engaging in speech is impeded in their ability to perform his or her duties. *Hamer*, 831 F.2d at 1402 (citing *Bowman*, 723 F.2d at 644).

By the time the medical staff unanimously voted to recommend Smith's temporary suspension, there was a long history of conflict between Smith and various Hospital administrators, members of the Board, nursing staff and other personnel. Smith notified the Hospital in July of 1976 that he was going to resign from the medical staff because of his disenchantment with the quality of patient care. Unhappy with the Hospital's response to his criticisms, Smith wrote a letter to his patients in November of 1976 saying he was quitting the Hospital in the near future. Because Smith had one of the largest patient loads in the Hospital, the economic effect of Smith quitting the Hospital would surely be felt.

But Smith was not making mere criticisms of the Hospital. He attacked several Board members by letter chastising them as political flunkies. The purpose of these personal attacks, in addition to Smith's letters to his patients, was a calculated effort to disrupt the efficiency of the Hospital. By bringing economic coercion against the Hospital as a public institution, even when some of Smith's initial criticisms were a matter of public concern, goes beyond the scope of constitutionally protected activity in view of the six factors enunciated in *Hamer* within the parameters of the *Pickering* balance test.

There is ample evidence to conclude that the medical staff found other numerous and sufficient reasons for voting to recommend that Smith's privileges be temporarily suspended. Smith was disruptive and a malcontent. He disassociated himself from the efficiency of the Hospital because he considered the only view which had merit was his. Even after a full investigation was made, he rejected the Department of Health's findings as insufficient and a cover-up.

We hold that when a person does initially engage in protected First Amendment speech on matters of a public concern, they may not use this protection, in the guise of public concern, to also level personal attacks on various officials and employees of a public institution which causes disruption, disharmony, dissention, and creates an adverse economic effect on the public service the institution performs. Because of the course of disruptive behavior of Smith over a period of three to four years, which included personal attacks on various people, the medical staff had sufficient foundation to recommend to the Board that Smith's privileges be temporarily suspended pending peer review.

CONCLUSION

The record in this case is voluminous and extensive. However, when the record is reviewed as a matter of law, the progeny of *Pickering* have refined the scope of what is considered protected speech as a matter of public concern and its effect on the public institution's ability to perform its public service. As a result of these refinements, to suggest to those persons engaged in protected speech to

hide behind its protection to also engage in non-protected personal attacks, is clearly beyond the special protection in the hierarchy of First Amendment values on speech of public concerns. We simply cannot allow this to happen in this case.

Dr. Smith did voice initially legitimate concerns. He also voiced personal attacks and when read in the manner, place and context in which they were made are not on matters of public concern. Therefore, when the medical staff voted to make their recommendation to the Board of Governors, it was for substantial reasons other than to retaliate against Smith for engaging in protected speech.

Smith was not discharged nor had his privileges revoked, either in fact or constructively. It was Smith's failure to comply with the necessary requirements to maintain staff privileges which led to his voluntary withdrawal from the Cleburne County Hospital's medical staff. Moreover, even if the Hospital constructively revoked Smith's privileges, there are other substantial reasons for the medical staff's recommendation which were not based on Smith engaging in First Amendment protected speech.

For the reasons discussed in this opinion, the district court is reversed and the case is dismissed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

DR. WAYNE SMITH, ET AL — PLAINTIFFS

v. — No. B-C-77-49

CLEBURNE COUNTY HOSPITAL, ET AL — DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Feb. 11, 1985)

Plaintiff, Dr. Wayne Smith, instituted this proceeding on the 26th day of April, 1977, asserting that the defendants, Cleburne County Hospital, the Board of Governors – V. H. Dickson, Chairman, County Judge Delane Wright, Ex-Officio Member, Larry Crabtree, Secretary, D. E. Barnett, Thomas Whitaker, J. M. Stuart, B. J. McNair and Oscar Patchell, members – and the Medical Staff consisting of Doctors William M. Wells, Michael E. Barnett, Max Baldridge, William H. Nevins, Nathan L. Poff, Donald H. McClanahan, Harral L. Cranford, Joe B. Scruggs, Robert Clark, Steve Blackburn, Jim Ashabramer, Robert R. Wilson and H. C. Williams, denied him medical staff privileges at the Cleburne County Arkansas Hospital because of public and private statements he made criticizing the quality of medical service afforded patients at the hospital and recommending that the standard of patient case be improved all in violation of his right to free speech as secured under the First and Fourteenth Amendments to the Federal Constitution.

Defendants, on the other hand, have asserted that Dr. Smith voluntarily withdrew from the medical staff of the hospital and further, pursuant to this Court's order

directing Dr. Smith to invoke available administrative remedies, defendants denied Dr. Smith's application for reinstatement because of Dr. Smith's personality conflicts with the medical and nursing staff, and the likelihood that the quality of patient care would be diminished if he were reinstated.

The Court concludes that the termination of Dr. Smith's medical staff privileges at the Cleburne County Hospital was not voluntary, but was revoked by defendants because of Dr. Smith's public criticism of the standard of patient care at the hospital rather than confining his criticism "in house". In other words, defendants' action was in direct retaliation against Dr. Smith for engaging in First Amendment protected activity, as hereinafter discussed and analyzed.

Plaintiff has asserted the following jurisdictional grounds: 28 U.S.C. §§ 1343(3) and 1343(4); 42 U.S.C. §§ 1983 and 1985(3). This action was initially instituted as a class action in behalf of doctors, nurses and medical care patients in Cleburne County, but proceeded to trial as an individual action.[1]

RELEVANT FACTS

The Cleburne County Hospital is a facility owned and operated by Cleburne County, Arkansas, and affords

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[1] The issues have been bifurcated. Accordingly, the Court will address the question of liability in this memorandum opinion and after affording the parties an opportunity to stipulate to the relief to be afforded, the Court will, if necessary, schedule a hearing on the question of relief to be accorded Dr. Smith.

extensive medical and surgical services to residents of Cleburne County.

The business affairs of the hospital are under the supervision and control of a Board of Governors consisting of eight persons – a chairman, an ex-officio member who is the incumbent county judge, a secretary and five members. The Board of Governors, pursuant to the by-laws of the Cleburne County Hospital are appointed by the county judge.[2]

The duties of the Board of Governors are:

(a) To adopt suitable by-laws.

(b) To select a competent hospital administrator and exercise general supervision over his duties.

(c) To approve the policies established by the hospital administrator.

(d) To approve the equipment and facilities necessary for the proper operation of the hospital.

(e) To select and approve competent and qualified medical staff and exercise general supervision over their duties and responsibilities.

(f) To approve the policies and recommendations of the medical staff.

(g) To require accepted recognized professional medical standards in providing health care services.

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[2] The Board of Governors derives its authority from the laws of the State of Arkansas (Ark. Stat. Ann. §§ 17-1501 through 17-1506) and the constitution and bylaws of the Cleburne County Hospital.

The administrator is the chief executive officer who is responsible for the management and day to day operation of the hospital.

(h) To require businesslike management of the financial affairs of the hospital and to employ an annual audit and to provide adequate financing by securing sufficient income.

(i) To review and act on the recommendations of all committees.

(j) To cooperate with the medical staff of the Cleburne County Hospital in the adoption and enforcement of the medical staff by-laws which shall contain, among other things, rules for granting and revoking staff appointments, granting, limiting and revoking professional privileges, election of medical staff officers, establishment of departments and committees and meetings thereof, patient care and preparation of patient records and teaching medical personnel.

(k) To attend to all other matters not enumerated but required by the law of the State of Arkansas.

The by-laws of the hospital further authorize the Board of Governors (Board) to establish a Joint Conference Committee consisting of a chairman, vice chairman, secretary of the Board, the chief administrator and the executive officers of the medical staff. The Joint Conference Committee is empowered to review recommendations and hear complaints from hospital personnel and staff physicians and submit to the Board the Committee's recommendations on those matters submitted for review.

The by-laws divide the medical staff into honorary, consulting, active, courtesy and dental members. The hospital medical staff members are appointed annually by the Board based on the recommendations of the members of the medical staff. The fiscal year of the hospital commences on October 1st and ends September 30th of each year. Thus, appointments to the medical staff are

made on October 1st of each year and extends to September 30th.

The plaintiff, Dr. Wayne Smith, commenced the general practice of medicine in July, 1968, in Cleburne County, Arkansas. The Cleburne County Hospital is the only hospital where plaintiff has applied and acquired medical staff privileges.[3]

From October 1, 1972, to September 30, 1973, plaintiff served as Vice Chief of Staff of the hospital; and from October 1, 1973, to September 30, 1974, he served as Chief of the Medical Staff.

On or about July 2, 1976, plaintiff began to criticize the quality of the patient care at the Cleburne County Hospital. Plaintiff's complaints were discussed with the medical staff, the Board, the Chief Administrator of the hospital, citizens of Cleburne County and the local news media.

Plaintiff's public expression, and particularly his statements to the news media, were registered after considerable press coverage was given to public meetings held by concerned citizens and in response to public pronouncements by Board members and members of the medical staff. For example, the Arkansas Sun, in its Wednesday, October 27, 1976, edition reported that "three concerned citizens" advised the Board of a public meeting held by concerned citizens in Cleburne County "for

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[3] The Cleburne County Hospital is the successor to the Heber Springs Hospital. The facility was renamed Cleburne County Hospital sometime after 1968.

the purpose of discussing the Cleburne County Hospital." The matters discussed by the concerned citizens were: (a) complaints regarding the non-enforcement of by-laws with reference to surgical schedule at the hospital, (b) failure of nurses to attend to patients' needs; (c) concern about the finances of the hospital; (d) the decline in census of the number of patients; (e) concern "over worker morale, lack of communication and employee complaints"; (f) "public opinion of patient treatment which has to do with hospital opeations (sic) and the medical staff"; (g) concern about "Dr. Smith's expressed plan to resign from the staff."

According to the news article, certain Board members acknowledged that there were problems at the hospital, but are "under correction. The reins were down on the ground, they have been picked up." (PX 69). Other Board members expressed surprise at the group's "meeting and their alarm."

The news article of October 27th, as well as other articles on the subject in the Arkansas Sun and the Cleburne Times, generated numerous letters to the editorial section of the local newspapers expressing views supportive of Dr. Smith and equally as many expressing support for the Board. These letters naturally created further interest in the patient care at the hospital resulting in additional meetings between Board members, the administrator and citizens of Cleburne County.

On December 20, 1976, the Board requested the Arkansas State Health Department to conduct an inspection and survey of the hospital facilities and the quality of patient care.

On December 23, 1976, the following statement appeared in the Cleburne County Times which was endorsed by ten physicians who possessed staff privileges at the hospital:

> The Cleburne County Hospital has received criticism from one member of the Medical Staff during recent weeks. We would like to make it clear to our patients, and to all county residents, that we are proud of our hospital and its employees. We feel confident that the majority of the Medical Staff gives their full cooperation and support to the Hospital Board of Governors, the Administrator, and other employees. We feel that our patients receive care that is not only adequate, but in many instances, superior, compared to other hospitals in the state. We feel that the majority of the nursing personnel at Cleburne County Hospital are dedicated, efficient and compassionate human beings. Finding fault is never difficult to do in any institution, and ours is no exception. However, we are determined to see that the faults we find are cured as quickly as possible by working within the organization, not by withdrawing from it.
>
> We expect our patients to tell us if they find a problem at our hospital which has escaped our attention, secure in the knowledge that we will do our best to keep problems to a minimum and to correct those quickly which are found.
>
> As taxpayers, you have every right to expect that a modern, clean, well-equipped, well-staffed hospital is provided for you, and that that hospital is managed in a businesslike, efficient manner. We feel that your expectations are fulfilled in our hospital.[4]

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[4] On January 26, 1977, Dr. Smith issued the following statement:

(Continued on following page)

The initial criticism registered by Dr. Smith regarding the inadequacy of patient care at the hospital was between April and July of 1976 when Dr. Smith submitted a statement to the Board, setting forth nineteen items of deficiencies. In November, 1976, Dr. Smith sent a letter to all of his patients and the Board stating that unless the Board conducted a thorough investigation of the hospital's operations, he would resign from the medical staff in April, 1977. Two of the specific complaints mentioned by Dr. Smith were: (1) The failure of doctors to abide by surgery schedules and (2) poor nursing care.

On December 29, 1976, Dr. Smith wrote a letter to Board members Dickson, Reed, Crabtree, Barnett and Whitaker, stating essentially that the hospital is "very inadequate" and that their indifference contributes to the problem and that each, in effect, should resign from the Board.

On January 27, 1977, Dr. Smith, during a Board meeting, stated that unless the Board took immediate steps to

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It is with deep disappointment that I see this Board acting in a manner that is detrimental to this hospital and to the health and well-being of the citizens of this county. I have expressed my opinion to the Board and individual members in the past, so will not belabor the point now. I do wish to assure you and the people of this county that I have only just begun to fight. I will not resign from the medical staff, and I will use every legal means that are available to me to insure that the hospital becomes a properly managed institution. I still hope that this Board or Judge Wright will correct problems that exist. Believe me, they will be corrected – through legal action by civil suit if necessary.

resolve the problems at the hospital, he would take the matter to court and further indicated his interest in seeking the public office of Cleburne County Judge.

On February 1, 1977, after the requested survey was conducted, the Arkansas Department of Health sent the following communication to the Administrator of the hospital:

> Dear Mr. Rector:
>
> Reference is made to an inspection of Cleburne County Hospital on January 31, 1977 by representatives of this Division.
>
> The following items are noncompliances with the Rules and Regulations for Hospitals and Related Institutions in Arkansas:
>
> I. Dietetic Services:
>
> 1. The hot food for the noon meal of January 31 was prepared too far in advance of the meal to be served.
>
> 2. The pot washing procedures were incorrect as only two vats of the three compartment sink were used for wash and rinse. The temperature of water for rinse registered 155°F. and the temperature should be 170°, preferably 180°F.
>
> 3. Cartons of milk in the refrigerator were observed to be outdated.
>
> II. Medical Staff:
>
> 1. All phone orders are not co-signed within 24 hours. According to Medical Staff by-laws and Arkansas Rules and Regulations for Hospitals all phone orders must be co-signed within 24 hours by the physician making the order.

III. Medical Reports: None

IV. Pharmacy:

1. Drug cabinets and refrigerators on the Nursing Units have not been thoroughly checked by the pharmacist and nurses. Some outdated drugs were found in each of these drug storage areas: the nurses' station, Coronary Care crash cart, Operating Room, Emergency Room, and the infant emegency (sic) tray for the Delivery Room.

2. Locked storage was not provided for drugs, including some controlled substances, in the Delivery Room and the Operating Room. This is especially important because these areas are unattended two shifts a day.

3. Pharmacy records did not include quantities dispensed as floor stock or as individual patient drugs. Adequate control must be maintained on prescription drugs through complete records.

4. Six of nine current charts reviewed indicated that stop order policies were not being followed. None of the patient charts had notes on the front asking the doctor whether certain drugs were to be discontinued or reordered.

5. The Pharmacy and Therapeutics Committee has held only two of the required quarterly meetings (January and November, 1976).

V. General Administration & Physical Plant:

1. The By-Laws of the Governing Body should be amended by amendment to include an overall statement of an overall admission policy for the facility using part II, Section 1, Para C-8, Rules and Regulations for Hospitals in Arkansas as a guideline.

2. There was observed some electrical medical equipment wired with two wire power cords. All equipment wired with two wire power cords should be rewired with a three wire power cord to provide a grounded circuit.

3. There was (sic) infant cribs, a stretcher and a crash cart stored in the O.B. area corridor. Egress should not be hampered in any corridor and corridors should be maintained open and unobstructed at all times.

VI. Nursing Service:

1. Unused medications or special prescriptions that do not meet sterile or label requirements shall be returned to the pharmacy or drug room. Several outdated drugs were found in the Emergency Room (Opthalmics) and Operating Room (Pentathol and used I.V. mixtures in the refrigerator). Nursing personnel in these areas should check expiration dates in the future.

2. A registered nurse shall be present as a circulating nurse during each delivery. In the past as indicated by the Delivery Room Register an L.P.N. has functioned in this position. This practice should be corrected in the future.

VII. Laboratory:

1. Refrigerators used for storing blood should be monitored for correct temperature. A refrigerator in surgery, which was sometimes used for storing blood, had no record of the correct storage temperature being verified.

VIII. Respiratory Therapy – None

IX. Infection Control – None

X. Radiology – None

The above deficiencies should be corrected at the earliest possible date in order to provide maximum

> care and/or safety to the patients in your hospital. It would be appreciated if your comments on the above could be forwarded to this office within the next 60 days or as soon thereafter as may be practicable. Such comments should include any corrective action taken or proposed resulting from our findings.
>
> If we can be of further assistance in respect to the above or in any other way, please let us know.[5]

On February 9, 1977, Dr. Smith announced his candicacy (sic) for county judge in the 1978 election. He stated his candidacy would enable him to take the hospital problem to the people. Specifically, Dr. Smith stated that the following matters would be addressed during his candicacy (sic):

> 1. Why does the County Judge refuse to say publicly what he says privately?
>
> 2. Why has the Board refused to investigate very specific allegations?
>
> 3. Why does the Board not supervise the hospital as it should?
>
> 4. Why does the Board allow the County Judge to run business that is supposed to be the practice of the Board?
>
> 5. Why does the Board refuse to supervise the medical staff as it should?
>
> 6. Why does the Board not wish the residents of the county to know what goes on?

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[5] The Director of the Division of Hospitals also sent to the administrator, under separate cover, written recommendations to be implemented at the hospital. The recommendations are attached to this opinion and designated as Appendix I.

7. Why does the Board tell residents of the county that the hospital problems are none of their business?

8. Why did the Board hire a man for administrator who is totally without qualifications for the job?

9. Why do these men insist on remaining on the Board when they obviously aren't doing their job?

10. Why does the administrator insist on staying with the job when he obviously isn't doing the job?

11. Why has the Board become synonymous with Cleburne County Politics, leaving out the G.F. (Greers Ferry) area?

12. Why does the medical staff not act like a medical staff?

13. Why does the medical staff accept pay from the hospital for E.R. (Emergency Room) coverage, yet not want to cover it?

14. Why can't the nurses be indoctrinated and properly trained?

15. Why do my critics not speak up officially and do something about me, if I'm so wrong?

16. Why do citizens of the county not speak up?

17. Why do I call his (sic) a rotten political mess?

On February 22, 1977, after concluding that the investigation conducted by the Arkansas Department of Health did not support Dr. Smith's claims of improper patient care, the, medical staff recommended, by way of resolution, to the Board that Dr. Smith's staff privileges be temporarily suspended' pending resolution of the

controversy and peer review of Dr. Smith's conduct by all physicians on the medical staff.

The Board appointed a committee to implement the intent of the resolution, but took no action on the recommendation. The committee requested the Ethics committee of the Arkansas Medical Society to investigate the controversy between Dr. Smith and the defendants. The Society declined to get involved in the controversy concluding that the problem appeared to be essentially a personality conflict.

On March 18, 1977, Dr. Smith advised the Administrator that he would not, on advice of counsel, participate in hospital activities, including emergency room duties.

On April 15, 1977, the United States Department of Health, Education and Welfare, Food and Drug Administration informed the Administrator of certain deficiencies of the Hospital's Blood Bank program.[6] Among other things, the deficiencies consisted of:

> 1. Failure to test each donation of Whole Blood (Human) for HBsAG by a method of sufficient sensitivity, i.e. third generation sensitivity, in that records to not indicate units drawn from donors #110 and #111 were tested prior or after transfusion.
>
> 2. Failure to keep proper blood processing records, including results and interpretation of all tests and retests.
>
> 3. Failure to maintain complete records of emergency blood transfusion including complete

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[6] The Department's Report and the Hospital's response indicating that correctional measures had been taken are attached to this opinion and designated as Appendix II.

documentation justifying the emergency action which is signed by the physician requesting the procedure.

4. Failure to maintain complete records in the performance of significant steps in the collection of units of Whole Blood (Human) in that some donor records observed did not contain answers to all medical history questions as well as donor signature at time of each donation.

5. Blood bank personnel were unfamiliar with FDA regulations.

6. Failure of donor records to document questioning donor of exposure within the last six months to an individual having viral hepatitis.

7. Failure to examine donor's arms and forearms for skin punctures or scars indicative of addiction to self-injected narcotics.

8. Failure to label a Group O Blood with a statement indicating whether or not isoagglutinin titers or other tests to exclude so-called "dangerous" Group O bloods were performed.

9. Failure to label units collected to indicate the date of expiration.

10. Failure to label emergency collected units that are issued for transfusion to indicate whether or not the serological test for syphilis and the test for hepatitis B surface antigen were performed prior to issue.[7]

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[7] According to plaintiff's Exhibit 125 which was introduced by agreement of counsel, during the weeks of January 11th, February 8th, March 8th, April 11th, May 9th, June 13th, July 11th, August 15th, September 12th, October 10th, November 14th, December 12th, 1976, and January 9th and February

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On April 26, 1977, plaintiff filed this lawsuit. In 1978, plaintiff moved his medical practice from Heber Springs to Hardy, Arkansas.

The trial of this action was scheduled for September 14, 1981. Defendants persisted that plaintiff had voluntarily abandoned his staff privileges and that defendants were not responsible in way. The Court, over the objections of plaintiff, stayed the action for sixty days in order to permit plaintiff to exhaust administrative remedies under the by-laws of the Medical Staff.

On October 14, 1981, the Joint Executive Committee of the hospital conducted a hearing to determine whether plaintiff should be granted active staff privileges. The committee, concluding that plaintiff's criticisms of the patient care at the hospital was detrimental to the interest of the hospital, that there were personality conflicts between plaintiff and the medical and nursing staff, and that the quality of medical services would diminish if

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13th, 1977, the following occurred at the emergency room of the hospital:

1. 47 percent of the patients did not see a doctor.
2. 34.4 percent of the patients were not administered to by a registered nurse.
3. 97.3 percent of the patients were not processed by a representative of the administration.
4. 15 percent of the patients were not seen either by a doctor or registered nurse.
5. 1.4 percent of the patients were processed by a representative of the administration, administered to by a registered nurse and seen by doctor.

plaintiff's staff privileges were restored, recommended to the Board that plaintiff be denied staff privileges. On November 13, 1981, the Board voted to accept the Joint Committee's recommendation.

DISCUSSION

The crucial question confronting the Court may be stated as:

> Whether the denial of medical staff privileges to the plaintiff on the basis of the facts in this case constituted an infringement of plaintiff's right to freedom of speech as secured under the First and Fourteenth Amendments to the Federal Constitution.

In analyzing the criticism registered by plaintiff regarding the patient care offered at the hospital, the Court finds that such criticism did not become essentially public in scope until some of the defendants made public statements to the news media and took out advertisement in the local newspapers expressing their views regarding the controversy.[8] Initially, plaintiff voiced his complaints

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[8] For example, plaintiff placed an advertisement in the local newspaper on June 15, 1978, stating:

> In an ad which appeared in this paper recently, it was said I quit the medical staff at the Cleburne County Hospital of my own free will. That ad, as presented, was a lie-the seven physicians and two dentists who signed it certainly know that I left the staff after it was recommended by the other doctors and dentists that I be suspended. That recommendation came as a result of my insisting on good care for patients. The hospital administrator and board never did what they are required to do by law-if they had,

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to the Board, medical staff members and his patients either orally or by written communication. Moreover, the thrust of plaintiff's criticism, both privately and publicly, was to persuade the Board to obtain a full scale investigation by an independent source into his allegations that the hospital was not operating in accordance with the by-laws and, as such, patient care was on the decline and that services were marginal at best.

Many Board and staff members, while acknowledging the existence of problems at the hospital, were, in essence, critical of plaintiff because the controversy did remain "in house" as opposed to becoming a public matter and ultimately a political issue.

Defendants' major concern in seeking to keep the controversy "in house" was the fear that the interest of the hospital would be jeopardized. However, in concluding that plaintiff's staff privileges should not be reinstated, defendants made no effort to, determine empirically and objectively, what harm, if any, had accrued to the hospital during the controversy or how plaintiff's reinstatement would cause patient care to diminish. In this regard, the Court notes that the fact that plaintiff became a candidate for county judge in 1978 and

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the problem would have been quickly resolved and I could have returned to the hospital. Not to this day have they done what they were required to do within ten days. These actions by the other doctors, hospital administrator and board resulted in a lawsuit which is pending. I was denied my rights and this is the only means to get them. I look forward to my day in court, for then I will have the opportunity to prove what I said.

was rejected by the people of Cleburne County would indicate that plaintiff's influence in Cleburne County was not as weighty as defendants perceived.

In examing (sic) the criticism registered by plaintiff, the findings and recommendations of both the Arkansas State Health Department and the United States Department of Health, Education and Welfare articulating problems and deficiencies at the hospital, the Court is persuaded that it cannot be said categorically that plaintiff's criticism was either false or knowingly or recklessly made. In other words, the complaints were substantially accurate. More importantly, the question whether a county owned and operated hospital is affording maximum patient care to its taxpayers is and should be an issue of public interest and concern.

The Arkansas Supreme Court in the case of *Baxter County Newspaper, Inc. v. Medical Staff of Baxter General Hospital*, 273 Ark. 511 (1981), has made it plain that where a hospital is a county owned facility supported by public funds, the proceedings of the Board and its various committees arc subject to Arkansas' Freedom of Information Act and the public possesses an unqualified right to know about the performance and accomplishments of the facility unless the proceedings fall under an exception to the Act. It is plain that had plaintiff elected to remain "in house" with his criticism, the public could not have been legally deprived of his expressed concerns about patient care at the hospital.

More importantly, it must be remembered that the exercise of the First Amendment right of freedom of speech cannot be conditioned, indeed within the context

of the factual circumstances of this case, on whether the utterances are good for the community or will likely result in an adverse image to the facility and its personnal. The thrust of defendants' argument appears to be that plaintiff was obligated to some degree of personal loyalty to the hospital and medical staff which renders obselete (sic) the public's right to know; that this, loyalty is vital to the proper functioning of the medical facility and a failure to adhere to this code of conduct justifies the revocation of plaintiff's staff privileges. The Court hastens to add that the Court is not convinced that this case involves the type of relationship between plaintiff and defendants that is of such a personal and intimate nature that certain forms of public criticism would likely undermine the effectiveness of the working relationship between them. Where, as here, comments on matters of public concern that are substantially true, such a concept is overshadowed by the force; and effect of the First Amendment. *See: Pickering v. Board of Education of Township High School District 205, Will County, Illinois,* 391 U.S. 563. Moreover, defendants had the privilege, and as a matter of fact did so, to rebut plaintiff's criticism by stating the facts, as they perceive them publicly. This case does not present an issue in which plaintiff's criticism is so reckless and without foundation so as to question his fitness to serve on the medical staff at the hospital.

The Court holds that on February 22, 1977, when the medical staff voted to recommend to the Board to suspend the staff privileges of plaintiff pending peer review of his conduct, plaintiff's staff privileges were constructively revoked in retaliation for engaging in First Amendment protected activity. Plaintiff's withdrawal from

activities at the hospital was involuntary. Moreover, the recommendation of the Joint Executive Committee to the Board not to reinstate plaintiff's privileges following the October 14, 1981, hearing and the Board's approval of the recommendation simply reaffirmed defendants' resistence to plaintiff's exercise of his First Amendment rights. The Court is convinced that plaintiff's conduct in essence incurred the displeasure of the defendants and had a further tendency to cause indignation.

By way of summary, in the factual context of this case, plaintiff's exercise of his right to comment on matters of public importance may not serve as a reason for the revocation or the denial of medical staff privileges at defendants' hospital. Plaintiff has met the burden of establishing that his conduct was constitutionally protected and that his conduct was the motivating factor in defendants' action in denying him medical staff privileges. Defendants, acting under color of state law – a county facility and county officials working in close connection with private defendants whose status as officials of the Hospital, Medical Staff membership, and positions on various committees of the Hospital, is authorized by state law – have not demonstrated that they would have denied plaintiff medical staff privileges in the absence of the protected conduct.

The parties are afforded thirty (30) days from the date of this opinion to agree on the relief to be afforded plaintiff. If the parties are unable to agree, a hearing on the question of relief is hereby scheduled on March 29, 1985, at 900 a.m. o'clock, at Little Rock, Arkansas.

IT IS SO ORDERED this 14th day of February, 1985.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 2-15-85 by jh.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

DR. WAYNE SMITH — PLAINTIFF

v. — No. B-C-77-49

CLEBURNE COUNTY HOSPITAL, SAM B. RECTOR, Individually and as Administrator of the CLEBURNE COUNTY HOSPITAL; the Board of Governors - V. H. DICKSON, Chairman, COUNTY JUDGE DELANE WRIGHT, Ex-Officio Member, LARRY CRABTREE, Secretary, D. E. BARNETT, THOMAS WHITAKER, J. M. STUART, B. J. McNAIR, OSCAR PATCHELL, RODNEY A. PETERSON, DON VERSER, CHARLES EVANS, ELAINE ELLIBEE, MILLARD FLETCHER, LOREEN HOUSTON, VERNON H. WOLD, WINCLE FOREST, ROGER MORIN and GLENWOOD B. ACHORN, Members - and the Medical Staff consisting of DOCTORS WILLIAM M. WELLS, MICHAEL E. BARNETT, MAX BALDRIDGE, WILLIAM H. NEVINS, NATHAN L. POFF, DONALD H. McCLANAHAN, HARROL L. CRANFORD, JOE B. SCRUGGS, ROBERT CLARK, STEVE BLACKBURN, JIM ASHABRAMER, ROBERT R. WILSON and H. C. WILLIAMS — DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Aug. 10, 1987)

On February 14, 1985, this Court found that plaintiff's medical staff privileges at the Cleburne County Hospital were revoked because plaintiff publicly criticized the patient care afforded patrons at the hospital; that the criticism was protected conduct under the First and Fourteenth Amendments to the United States Constitution; and that defendants had failed to demonstrate that plaintiff's staff privileges would have been revoked even in the absence of the exercise of the protected conduct. The parties were afforded an opportunity to agree on the relief to be afforded plaintiff, but were unable to do so. Accordingly, in March, 1986, the Court conducted a hearing regarding the relief to be afforded.[1] The parties have submitted briefs, proposed findings of fact and conclusions of law in support of their respective positions. After carefully considering the evidence and argument of counsel, the Court now makes the following rulings:

I.

THE FEBRUARY 14, 1985 OPINION AND ORDER ARE AMENDED

A. QUALIFIED IMMUNITY:

Defendants have argued, in their briefs, that this Court did not address the affirmative defense of qualified

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[1] By agreement of counsel, the issues were bifucated. The order of the Court of February 14, 1985, dealt exclusively with the question of liability. See, *Smith v. Cleburne County Hospital*, 607 F. Supp. 919.

immunity, asserted by defendants, in its Opinion and Order of February 14, 1985. On the other hand, plaintiff argues that while the Court did not make a specific finding that defendants had forfeited their qualified immunity, it is clear that such a finding was "expressly implicit in its findings that defendants were liable to Dr. Smith." In any event, the Court, in an effort to alleviate any uncertainty or to put the matter to rest, holds that defendants, as hereinafter identified, knew or should have reasonably known that the action they took on February 22, 1977, and subsequently thereto, resulting in the termination of plaintiff's medical staff privileges at the Cleburne County Hospital, because of plaintiff's public criticism of the standard of patient care at the hospital, would violate rights clearly secured under the First and Fourteenth Amendments to the United States Constitution. *See, Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968).[2] Surely, as plaintiff's counsel argues, the principle enunciated by the Supreme Court in *Pickering* had been "well cystalized (sic)" by February 22, 1977. *See also: Perry v. Sindermann*, 408 U.S. 593 (1972) where the Supreme Court observed: "For at least a quarter-century, this Court has made it clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him benefit for any number of reasons . . . it may not deny a benefit . . . on a basis that infringes his constitutional protected interests – especially, his interest in freedom of speech."; *Wilderman v. Nelson*, 467 F.2d 1173

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[2] Whether an official's claim of qualified immunity is a viable defense is a question of law as opposed to one in fact. *Mitchell v. Forsyth*, 105 S. Ct. at page 2816.

(8th Cir. 1972) (" . . . [T]he existence of a tenure 'right' is immaterial to a claim of dismissal in retaliation for a state employee's exercise of his constitutionally protected right of free speech . . . "); *Gieringer v. Center School District No. 58*, 477 F.2d 1164 (8th Cir. 1973), *cert. denied*, 414 U.S. 832, 94 S. Ct. 165 (a teacher's report to teacher's association which did not appear to be a deliberate attempt to deceive or frustrate the district's operations was "constitutionally protected activity and dismissal was impermissible"); *Birdwell v. Hazelwood School District*, 491 F.2d 490 (8th Cir. 1974) (teacher retains right as a citizen to comment on matters of public concern and to the degree that such comment is substantially accurate, it provides no basis for dismissal).

This Court is also persuaded that the evidence supports a finding that defendants lacked good faith in pursuing the course of conduct resulting in the revocation of Dr. Smith's medical staff privileges. *See, Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984).

B. ADDITIONAL DEFENDANTS:

The following designated individuals were inadverently omitted as defendants in this Court's Memorandum Opinion and Order of February 14, 1985, and, therefore, are designated now: Sam B. Rector, individually and as the Administrator of the Cleburne County Hospital; Rodney A. Peterson, Don Verser, Charles Evans, Elaine Ellibee, Millard Fletcher, Loreen Houston, Wincle Forest, Roger Morin and Vernon H. Wold, as members of Cleburne County Hospital Board of Governors. However pursuant to court order, this action has been dismissed as

to defendants Dr. William H. Nevins, Delaine Wright, Don Verser, J. M. Stuart and Glenwood B. Achorn.

In addition, it is conceded that the following defendants are not liable for any alleged damages sustained by plaintiff, but are party defendants for any equitable relief that plaintiff may be entitled to: Rodney A. Peterson, Charles Evans, Wincle Forest and Roger Morin. The Court grants plaintiff's motion to substitute Jessie Faye Scruggs as executrix of the estate of Dr. Joe B. Scruggs as a party defendant. There is no opposition to the requested action.

C. JOINTLY AND SEVERALLY LIABLE:

Defendants further contend that the Court did not specifically find in its February 14, 1985, Opinion and Order that defendants were jointly and severally liable to plaintiff and, therefore, if damages are awarded, such damages must be apportioned as to each defendant held liable in damages. On the other hand, plaintiff asserts that it is implicit in the findings of fact and conclusions of law that defendants are jointly and severally liable to plaintiff.

Again, in an effort to alleviate any uncertainty and place this issue at rest, the Court holds that defendants are jointly and severally liable to Dr. Smith for compensatory damages inasmuch as defendants, from February 22, 1977, to and including November 13, 1981, acted in concert to revoke the medical staff privileges of Dr. Smith in

retaliation against him for engaging in protected First Amendment activity.[3]

II.

CLEBURNE COUNTY HOSPITAL

The Cleburne County Hospital is an entity owned and operated by Cleburne County, Arkansas, a local governmental entity, but is under the supervision and control of a Board of Governors pusuant to the statutory laws of the State of Arkansas. Among other things, as this Court found in its Memorandum Opinion and Order of February 14, 1985, the Board possesses the duty to "select and approve competent and qualified medical staff and *exercise general supervision over their duties and responsibilities;* and to approve the policies and recommendations of the medical staff."[4] (Emphasis added). However, the Court

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[3] The universal or general rule seems to be that all defendants need not act in concert in order to be liable as joint tortfeasors. Under this concept, tortfeasors acting independently are jointly liable when the independent acts of each work together to cause the damage sustained by plaintiff. While the Court is convinced that defendants acted in concert in the revocation of plaintiff's staff privileges, the Court would encounter no difficulty, based on the evidence, in holding that the independent acts of each defendant proximately caused the damage sustained by plaintiff.

[4] As previously found, the by-laws of the hospital authorize the Board to establish a Joint Conference Committee consisting of a chairman, vice chairman, secretary of the Board, the chief administrator – who is responsible for the management and day to day operation of the hospital – and the executive

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finds that it has been the custom and practice of the Board over the years to give approval automatically to the recommendations of the medical staff and the Joint Conference Committee without independent consideration or scrunity. Hence, the recommendation of the medical staff of February 22, 1977, that the staff privileges of Dr. Smith be temporarily suspended and that a peer review of Dr. Smith's conduct be made by all physicians on the medical staff was in essence final and absolute. In other words, the medical staff was the alter ego of the Board. Thus, the action of the medical staff was in essence a "decision officially adopted and promulgated by the [Board]." *Monell v. New York City Department of Social Services*, 436 U.S. 658 (See at 690-91) (1978); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1980). Dr. Smith knew this. This Court is persuaded that the medical staff not only knew that working conditions at the hospital for Dr. Smith under such circumstances would be difficult and intolerable, but intended to make conditions intolerable. It must be remembered that the February 22, 1977, resolution was approved unanimously by the individuals who would have input in any peer review of Dr. Smith.[5] Both

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officers of the medical staff. The Joint Conference Committee is authorized to review recommendations and hear complaints from hospital personnel and staff physicians and submit to the board recommendations on such matters.

[5] The Court found in its Memorandum Opinion and Order of February 14, 1985, that Dr. Smith's withdrawal from activities at the hospital, following the adoption of the February 22, 1977, resolution by the medical staff, was involuntary and that plaintiff's privileges were constructively revoked in retaliation for engaging in a protected activity.

V. H. Dickson, Chairman of the Board, and Sam Rector, Administrator, testified that the Board never rejected arecommendation from the medical staff regarding staff privileges at the hospital.[6]

Given the omissions of the Board over the years in assuming its responsibility to scrutinize the medical staff's recommendations and the Board's conscious and deliberate indifference to the deprivation of Dr. Smith's constitution rights, by unanimously voting to reject Dr. Smith's application for staff privileges, which action was premised on the recommendation of the February 22, 1977, the Board's action was, in essence, a reaffirmation of the medical staff's action. Thus, the Cleburne County Hospital must respond also in any compensatory or nominal damages awarded under the teaching of *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).[7]

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[6] While this Court is of the view that the Board, as policy maker, has not exercised authority over the conduct of the medical staff and the Joint Conference Committee, consisting among others, of the Chief Administrator of the hospital and executive officers of the medical staff, and has delegated, in effect, that authority to the medical staff, the Court is also persuaded that the Board may be found liable for failure to adequately supervise and monitor the conduct of its subordinates.

[7] This Court found in its Memorandum Opinion and Order of February 14, 1985, that defendants had failed to demonstrate, by a preponderance of the evidence, that Dr. Smith's medical staff privileges would have been revoked even in the absence of his exercise of First Amendment privileges.

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III.

COMPENSATORY DAMAGES

Plaintiff argues vigorously that defendants' concerted conduct, commencing, as previously found, on February 22, 1977, resulting in the revocation of plaintiff's staff privileges at the Cleburne County Hospital, proximately caused the following damages sustained by plaintiff:

1. Loss of income from his medical practice in the sum of $1,004,953.30; and,

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(Continued from previous page)

Defendants have urged this Court to reconsider its holding arguing, in effect, that defendants could have achieved the same result absent the protected conduct. The Court hastens to emphasize that defendants now, at this late stage of the proceeding, speculate or theorize that they could have invoked reasons to revoke plaintiff's staff privileges.

It must be remembered that on September 2, 1976, the medical staff recommended that Dr. Smith's staff privileges be renewed for the ensuing year, commencing October 1, 1976, and ending September 30, 1977. The Board of Governors accepted this recommendation on September 30, 1976. Surely, if plaintiff's behavior was so improper or disruptive to the general welfare of the operations of the Cleburne County Hospital, plaintiff would not have been approved for staff privileges for the 1976-77 term. Moreover, from October 1, 1972, to September 30, 1973, Dr. Smith served as Vice Chief of Staff of the hospital; and from October 1, 1973, to September 30, 1974, he served as Chief of the Medical Staff. This Court is still convinced, from a consideration of the evidence contained in the record as a whole, that plaintiff's staff privileges were revoked because he elected not to confine his criticism of the patient care offered by the Cleburne County Hospital "in house" as opposed to public utterances.

2. Mental anguish in the sum of $100,000; and,

3. Interest in Flying Wheels, Inc., a corporation, valued at $140,000.00 was lost pursuant to a foreclosure proceeding.[8]

The aggregate sum claimed as compensatory damages is $1,244,953.30.

After carefully scrutinizing the evidence and considering the argument of counsel, the Court holds that plaintiff has failed to establish with any degree of certainty that the alleged damages claimed were the proximate results of the conduct of defendants in retaliating against plaintiff for engaging in the exercise of free speech as secured under the Federal Constitution; and the Court is not persuaded that the alleged harm realized by Dr. Smith would not have occurred "but for" the defendants' wrongful and intentional conduct. In other words, there are numerous independent factors that could have played a role in producing the damages allegedly sustained; and for this Court to hold, either that the independent factors, as discussed hereafter, are irrelevant or that defendants' conduct was the proximate cause would require this Court to engage in speculation and conjecture as to causation of the asserted damages. For example:

1. The evidence reflects that during the fall of 1976, Dr. Smith recommended to his patients that they not

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[8] Plaintiff argues that he and his wife were the owners of 99 percent of the stock in a corporate venture known as "Flying Wheels"; and that because of the conduct of defendants, he was unable to take care of a second mortgage on corporate assets and lost $140,000.00 as a consequence of a foreclosure proceeding.

make use of the Cleburne County Hospital. Dr. Smith also stated in the same communication, that he planned to resign from the medical staff and quit using the hospital.[9] In the absence of any evidence demonstrating that this communication had no material impact on the recipients' decision or other patients who heard about the communication to sever the patient-doctor relationship with plaintiff would place causation on an unverified supposition.

2. Dr. Smith entered the political race for the position of County Judge of Cleburne County in February, 1977. Aside from the likelihood of alienating friends as well as current and prospective patients because of his entry into the political arena, indeed, Dr. Smith could not devote the time and interest to his medical practice that he had devoted previously because of the time and energy that are generally required in a political campaign. There is absolutely no evidence in the record indicating whether this political venture of Dr. Smith's impacted either negatively or positively on his medical practice. However, given the fact that Dr. Smith lost the election, there is a strong inference that the voters of Cleburne County did not accept his credentials as being worthy of assuming the role as County Judge.

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[9] On January 26, 1977, Dr. Smith made the following public announcement:

> It is with deep disappointment that I see this Board acting in a manner that is detrimental to this hospital and to the health and well-being of the citizens of this country. I have expressed my opinion to the Board and individual members in the past, so will not belabor the point now. I do wish to assure you and the people of this country that I have only just begun to fight. *I will not resign from the medical staff and I will use every legal means that are available to me to insure that the hospital becomes a properly managed institution.* I still hope that this Board or Judge Wright will correct problems that exist. Believe me, they will be corrected – through legal action by civil suit if necessary. (Emphasis added).

3. Dr. Smith indulged in an extra marital affair with one Judy Coffee, although he was married, which continued over a period of two years ending sometime in 1977. This relationship was widely known in a community that is part and parcel of the "Bible belt. " There is no way that this Court or anyone else can say with any degree of accuracy that this illicit relationship did not have a negative effect on the plaintiff's medical practice.

4. Sometime during 1975, Dr. Smith withdrew from his church because of differences over alleged doctrinal matters. To conclude that a controversy which centered on religious tenets or articles of faith did not impinge his medical practice or affect his practice, on a silent record, would require speculation.

5. In 1974, plaintiff severed his relationship with the Heber Springs Country Club because of his apparent disagreement over a policy or practice of serving alcoholic beverages at the club. To conclude that plaintiff's strong and open stand in favor of abstinence from the use of alcoholic liquors at the country club did not affect his practice would also require speculation.

The aforementioned factors, which this Court characterizes as intervening factors that could have impacted either favorably or unfavorably on plaintiff's medical practice, depending, of course, on the views of his patients or prospective patients, are social issues which clearly have the potential of generating either extreme and uncritical enthusiasm for or extreme aversion and hostility to plaintiff. It must be remembered that plaintiff has the burden of proof to show the proximate cause of the damages sustained by a preponderance of the evidence.

IV.

MENTAL ANGUISH

Dr. Smith testified that he realized emotional distress and humiliation because of the revocation of his staff privileges as a consequences of the exercise of First Amendment rights. Defendants argue:

> "Absent plaintiff's own testimony, there was no proof of mental anguish in the form of testimony from his current wife or other individuals who know him well."
>
> . . .
>
> "With such a thin record regarding mental anguish, any award of damages would be wholly speculative."

In *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976), the Court of Appeals held that a plaintiff's own testimony may be solely sufficient to establish mental distress and embarrassment.

The evidence reflects that Dr. Smith commenced the general practice of medicine in July, 1968, in Cleburne County, Arkansas; and that the Cleburne County Hospital is the only hospital where plaintiff qualified for medical staff privileges. Since the action of the medical staff culminating in the revocation of Dr. Smith's staff privileges, Dr. Smith has been deprived of the association and fellowship with his peers at the hospital. Given the fact that the medical profession is a specialization in which the interchange of ideas and views are most beneficial, it is readily apparent to this Court that the loss of staff privileges had a tremendous impact on plaintiff.

Moreover, the fact that defendants, and particularly the medical staff, deemed it necessary to revoke plaintiff's staff privileges and recommend a peer review of his performance at a time when the public's interest, regarding the services offered at the hospital, was at its apex, indeed, resulted in mental distress and great embarrassment to plaintiff.

After carefully considering the record in its entirety, this Court is persuaded that $15,000.00 is a reasonable figure to compensate plaintiff for mental distress. Accordingly, defendants are liable to Dr. Smith, jointly and severally, in the sum of $15,000.00 for mental distress.

V.

PUNITIVE DAMAGES

Punitive damages may be awarded in a Section 1983 proceeding. *Garrick v. City and County of Denver*, 652 F.2d 969 (10th Cir. 1981); *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965) ("the availability of punitive damages in a § 1983 proceeding is governed by 'federal common law of damages' "); *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966); *Davis v. Board of Trustees of Arkansas A & M College*, 270 F. Supp. 528 (E.D. Ark. 1967).

In *Davis, supra*, Judge Oren Harris observed:

> An individual . . . deprived [of his constitutional rights] is given a right of action at law. Such an action sounds in tort and exemplary or punitive damages may be awarded.

This Court is persuaded that members the medical staff, even prior to the meeting of February 22, 1977, were determined to retaliate against Dr. Smith for discussing the problems at the hospital publicly. For example, Dr. Wells testified during the liability phase of this proceeding:

> " . . . I think the reasons for this document [resolution of February 22, 1977] began many weeks and months before the actual document was prepared and the degree of frustration that I felt, the degree of sadness that I felt at seeing a fine, working community institution being maligned when I could find no evidence of justification for this, *the accusation created in me a tremendous urgency and a sense of need to retaliate . . .* ". (Emphasis added)

Accordingly, the Court awards the following sums as punitive damages against the actual and responsible individuals for their malicious, willful, wanton and intentional action:

Dr. Max Baldridge	$ 8,500.00
Dr. Nathan L. Poff	$ 8,500.00
Dr. William M. Wells	$ 8,500.00
Dr. Michael E. Barnett	$ 8,500.00
Estate of Dr. Scruggs	$ 8,500.00
Dr. Steve Blackburn	$ 8,500.00
Dr. Robert Earl Wilson	$ 8,500.00
Dr. Harrol L. Cranford	$ 8,500.00
Dr. H. C. Williams	$ 8,500.00
Dr. Robert Clark	$ 8,500.00
Dr. Donald H. McClanahan	$ 8,500.00
Dr. Jim Ashabramer	$ 8,500.00
V. H. Dickson	$ 1,000.00
Larry Crabtree	$ 1,000.00
D. E. Barnett	$ 1,000.00
Thomas Whitaker	$ 1,000.00
B. J. McNair	$ 1,000.00

Oscar Patchell	$ 1,000.00
Elaine Ellibee	$ 1,000.00
Millard Fletcher	$ 1,000.00
Loreen Houston	$ 1,000.00
Vernon H. Wold	$ 1,000.00
Sam Rector	$ 1,000.00

The Court holds that Cleburne County Hospital, which is owned and operated by Cleburne County, a corporate entity, is immune from punitive damages in this § 1983 proceeding. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2nd 616 (1981). This Court is not persuaded that the conduct resulting in the revocation of Dr. Smith's medical staff privileges is so "outrageous" as to justify a punitive sanction "upon the shoulders of blameless or unknowing [Cleburne County] taxpayers." 453 U.S. at 267, 101 S. Ct. at 2760, 69 L. Ed. 2d at 632.

VI.

INJUNCTIVE RELIEF

This Court is persuaded that defendants should be directed to restore plaintiff's medical staff privileges at the Cleburne County Hospital, within a reasonable length of time after Dr. Smith has communicated his desire to be admitted to staff privileges, providing plaintiff meets the same objective standards applicable to physicians currently afforded staff privileges at the Hospital.

Dr. Smith argues that while he has kept current with relevant medical literature, he is not "now competent for hospital work and/or procedures and must be retrained for those purposes." Accordingly, Dr. Smith has requested this Court to require defendants to underwrite

the cost of retraining. The Court, however, is not persuaded that plaintiff has demonstrated that he exercised a reasonable and good faith effort to maintain his "hospital skills" by, for example, enrolling in a continuing educational program or program offered by the University of Arkansas Medical Center or associating with some other hospital, state, county or federal, either on a full-time or part-time basis in an effort to mitigate any reduction in his skills. While it is plain that the burden of proof is on defendants to show that plaintiff has failed to mitigate damages, plaintiff was required to minimize his damages by the exercise of due diligence. Seemingly, Dr. Smith would not have been required to expend substantial sums of money to maintain his "hospital skills." Thus, the Court denies plaintiff's request that defendants be required to pay for cost of any retraining that might be required to qualify plaintiff for staff privileges.

In summary the Court holds:

1. Dr. Smith has failed to establish by a preponderance of the evidence that defendants' conduct proximately caused the financial claims that he has asserted in this proceeding, because of the deprivation of his federal constitutional rights.

2. Plaintiff is awarded the sum of $15,000.00 for mental distress and embarrassment against defendants jointly and severally.

3. Because of the willful, malicious, wanton, reckless and conscious indifference manifested by the defendants regarding the constitutional rights of Dr. Smith, the Court awards punitive damages, as indicated, in the sum of $113,000.00.

4. Defendants are enjoined to readmit Dr. Smith to the Cleburne County Medical Staff within a reasonable time following any request on his part, providing that Dr.

Smith meets objective standards that are currently in force and applicable to all physicians at the Cleburne County Hospital. If plaintiff elects to take a refresher course in order to improve his medical skills, he should be afforded a reasonable period after the completion of such program to apply for readmittance to the medical staff.

Counsel are afforded ten (10) days from the file-date of this Memorandum Opinion and Order in which to advise the Court of any issue submitted for adjudication which has not been considered in the memorandum.

IT IS SO ORDERED this 10August, 1987.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 8/10/87 by illegible.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2587/2620/2621/2622EA

Dr. Wayne Smith,

Appellant,

vs.

Cleburne County Hospital, Sam B. Rector, Individually and as Administrator of the Cleburne County Hospital; the Board of Governors – V. H. Dickson, Chairman, County Judge Delane Wright, Ex-Officio Member, Larry Crabtree, Secretary, D. E. Barnett, Carolyn Sue Duncan as Executrix of the Estate of Thomas J. Whitaker, J. M. Stuart, B. J. McNair, Oscar Patchell, Rodney A. Peterson, Don Verser, Charles Evans, Elaine Ellibee, Millard Fletcher, Loreen Houston, Vernon H. Wold, Wincle Forest, Roger Morin and Glenwood B. Achorn, Members – and the Medical Staff Consisting of Doctors William M. Wells, Michael E. Barnett, Max Baldridge, William H. Nevins, Nathan L. Poff, Donald H. McClanahan, Harrol L. Cranford, Jessie Faye Scruggs as Executrix of the Estate of Dr. Joe B. Scruggs, Robert Clark, Steve Blackburn, Jim Ashabramer, Robert R. Wilson and H. C. Williams,

Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

(Filed April 24, 1989)

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the district court is reversed and the appeals are dismissed in accordance with the opinion of this Court.

March 8, 1989

Aplee/Cr-aplnt Cleburne County Hospital, shall recover from aplnt/cr-aplee, Smith, the sum of $233.75.

Aplee/Cr-aplnt, Board Members, shall recover from Aplnt/Cr-aplee, Smith, the sum of $263.20.

Aplee/Cr-aplnt, Physicians, shall recover from Aplnt/Cr-aplee, Smith, the sum of $310.80.

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: APRIL 19, 1989

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2587/2620/2621/2622

Dr. Wayne Smith, Appellant, vs. Cleburne County Hospital, et al. - Appellees.	* * * * * * * * *	Appeal from the United States District Court for the Eastern District of Arkansas

The suggestion for rehearing en banc has been considered by the Court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. The petition for rehearing is also ordered denied. Judge Arnold did not participate.

April 12, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-23

In The

Supreme Court of the United States

October Term, 1988

DR. WAYNE SMITH,

Petitioner,

v.

CLEBURNE COUNTY HOSPITAL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly applied the proper standard of review in reversing the District Court Opinion that Dr. Smith's Hospital staff privileges were constructively revoked in retaliation for exercise of First Amendment rights, where the appellate court did not specifically mention that it applied the clearly erroneous standard to factual findings and where the court held as a matter of law that Dr. Smith's speech activities were beyond the scope of constitutional protection.

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STATEMENT OF THE CASE

Dr. Wayne Smith, a general practice physician, first submitted written application and was accepted on the medical staff of Cleburne County Hospital (Hospital) in 1968. Hospital by-laws provided that the medical staff each year was to submit recommendations to the Hospital Board of Governors as to which physicians, upon submission of written application, should be accepted onto or remain on the medical staff. Membership on the Hospital medical staff, while permitting the physician to admit patients to the Hospital, carried certain responsibilities such as attending monthly staff meetings and providing rotating coverage for the Hospital emergency room.

By the mid 1970's, Dr. Smith had become dissatisfied with the level of care provided by the Hospital and voiced numerous complaints about the way the Hospital was operated by both the administration and the medical and nursing staff. In July 1986, Dr. Smith informed the Hospital Administrator of his intent to resign from the staff and began so informing his patients as well. Dr. Smith drastically reduced his admissions to the Hospital. On November 22, 1976, Dr. Smith wrote the Hospital Board of Governors requesting an investigation of the Hospital and stated he should no longer remain on the staff if such investigation did not bear out his complaints and instead showed him to be the problem. (PX 76) On that same date, Dr. Smith distributed an open letter to his patients complaining of patient care and the operation of the Hospital and indicating his intent to quit using the Hospital and to resign from the staff. (PX 75) On December 20, 1976, the Hospital Board, largely in response to

Dr. Smith's criticisms and public debate, made arrangements for the Arkansas Department of Health to undertake an inspection and evaluation of the Hospital facilities and quality of care. Shortly thereafter, members of the medical staff took out an advertisement in the local newspaper supporting the Hospital and quality of care it provided. Debate concerning the Hospital and Dr. Smith's complaints received wide press coverage and discussion at public forums. During this time period, Dr. Smith was also issuing some rather biting personal attacks against the Hospital Administrator, Board of Governors, and fellow members of the medical staff, both publicly and privately. At the January 3, 1977 medical staff meeting, Dr. Smith indicated he would not be satisfied with an Arkansas Department of Health investigation and that if such investigation found the Hospital provided adequate care, he would be unable to live with his conscience and would resign. (PX 100) The Arkansas Department of Health completed its investigation and submitted the results on February 1, 1977. (PX 108,109) The report noted some deficiencies; Dr. Smith felt the report indicated the Hospital was providing poor care; other physicians felt it was a basically good report. Dr. Smith announced his candidacy for county judge on February 9, 1977 with a platform critical of the Hospital administration and care provided.

At the February 22, 1977 medical staff meeting, a meeting Dr. Smith chose not to attend, the medical staff passed a resolution *recommending* to the Hospital Board of Governors that the Board *temporarily suspend* Dr. Smith's staff privileges since the medical staff felt the Arkansas Department of Health investigation did not support

Smith's claims of improper patient care. (That resolution, PX 126, is attached as Appendix A.) Dr. Smith responded by writing the Hospital Administrator on February 25, 1977 that in light of the medical staff allegations, he had "no choice but to cease hospital activity" until the matter was resolved. (PX 128) The Administrator responded by letter indicating he understood Dr. Smith's letter to be a letter of resignation which he would pass on to the Board. (PX 134) Dr. Smith replied with a letter that same day indicating he had not resigned from the active medical staff. (PX 135) Consequently on March 17, 1977, the Administrator wrote Dr. Smith that the Board considered him to be an active member of the medical staff and reminded him of his obligations to retain that privilege, including emergency room coverage. (PX 138) Dr. Smith responded by letter dated March 18, 1977 that, on advice of counsel, he would not be "actively participating in hospital activities for some time." (PX 139) On March 24, 1977, the Joint Committee which had been appointed by the Board of Governors to look into the controversy acted on the medical staff recommendation by requesting the Professional Relations Committee of the Arkansas Medical Society to investigate the situation. That Arkansas Medical Society committee investigated for a period of time and determined the controversy was a personality conflict and the committee ceased its investigation.

Dr. Smith did not accept further coverage assignments or attend further staff meetings following the medical staff recommendation. After Dr. Smith missed more than four staff meetings, he was taken off the medical staff in accordance with staff by-laws. Dr. Smith was

provided forms necessary to complete his yearly application for renewed staff privileges which were due back by August 20, 1977. All doctors desiring staff privileges were required each year to reapply. Dr. Smith failed to respond, nor did he participate in further Hospital activities.

The next formal activity was a hearing by a Joint Executive Committee of the Hospital in October 1981 at the direction of the District Court on the issue of whether Dr. Smith should be granted renewed staff privileges. The committee heard testimony and determined Dr. Smith should not be granted privileges based on its belief that Dr. Smith's return would be detrimental to the Hospital and the care it provided. The Board accepted the recommendation that Dr. Smith's staff privileges not be renewed.

Trial of this matter was bifurcated by the District Court. Upon completion of the liability phase, the court concluded Dr. Smith's privileges were constructively revoked in retaliation for his exercise of First Amendment rights by the medical staff action in February 1977 and the Board action in November 1981. Following the remedy phase of trial, Dr. Smith was awarded compensatory damages of $15,000.00 for mental anguish, and punitive damages were assessed against individual defendants. Additionally, reinstatement was ordered upon a showing that Dr. Smith met objective criteria for participating on the medical staff. The Eighth Circuit Court of Appeals reversed the liability decision, holding that Dr. Smith voluntarily resigned from the medical staff and that his speech fell outside the scope of constitutionally protected activity.

REASON FOR DENYING THE WRIT

The Eighth Circuit Court of Appeals applied the proper standard of review in reversing the Opinion of the District Court that Dr. Smith's staff privileges were constructively revoked in retaliation for exercise of First Amendment rights. On the issue of constructive revocation, the Court of Appeals, without specifically citing Rule 52 of the Federal Rules of Civil Procedure or the clearly erroneous standard, made it abundantly clear that from a review of the record, it was convinced that a mistake had been made by the District Court in its factual findings and conclusions. The appellate court referred to specific factual matters, either ignored or not given appropriate consideration by the District Court, which made it unmistakably clear that Dr. Smith voluntarily resigned from the medical staff of Cleburne County Hospital and, likewise, the absence of evidence that the medical staff, Hospital Board, or other Hospital representatives deliberately made conditions so intolerable that Dr. Smith could not stay. The appellate court also specifically reversed the District Court as to its First Amendment findings. The Court of Appeals noted that the inquiry as to whether speech is constitutionally protected is a question of law (not subject to the clearly erroneous standard) and held that the District Court failed to take into account that Dr. Smith's complaints evolved into vindictive personal attacks designed to disrupt the functioning of the Hospital rather than comments on matters of public concern. The Court of Appeals held that the District Court erred as a matter of law in automatically affording Dr. Smith's complaints the highest level of First Amendment protection just because they ostensibly concerned

the public motive of quality care at the county-operated hospital and by not recognizing that they had degenerated into destructive personal attacks disrupting the operation and efficiency of the Hospital.

This case was correctly decided by the Eighth Circuit Court of Appeals and the appropriate standard of review was used. The rules of law applicable to the case, particularly as to the First Amendment analysis, have been rather fully explored by this Court in several landmark cases. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). A review of this case would not materially advance the development of that area of the law as there are no gaping holes left from prior decisions which are presented here. Dr. Smith does not even allege, nor could he, that this case presents an issue on which considerable conflict and difference of opinion exists among the circuits or other lower courts for which further guidance would be beneficial. In fact, the circuits are in agreement. See, *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985); *Davis v. West Community Hosp.*, 755 F.2d 455 (5th Cir. 1985); *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868 (4th Cir. 1984); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984) (constructive discharge). Further review and holdings in this case would in all likelihood only affect these litigants rather than allowing this Court to provide needed guidance in an important and unsettled area. The questions presented in this case were not particularly novel so as to offer the Court an opportunity to address an important new twist of widespread interest. Rather, the issue was whether the applicable law was

applied to the facts of this case and a correct result reached. A critical examination reveals that all Dr. Smith is even colorably seeking here is for this Court to review and reverse what he believes to be an erroneous decision by the Eighth Circuit. Surely Dr. Smith is not seriously alleging that the appellate court elected to apply a different standard of review from that mandated by Rule 52 and relevant case law just because it did not cite the rule by number and use the words "clearly erroneous". The Eighth Circuit Court of Appeals knows the standard of review, as evidenced by many prior cases where the court has quoted and applied it, and the court applied that standard here. An issue deserving of this Court's limited time and resources is not presented here. This case simply involves one man who is dissatisfied with the results because the appellate court came down on what he felt to be the wrong side when applying firmly established precedent to the facts of this case.

Dr. Smith, in this request for review, complains that the Eighth Circuit Court of Appeals failed to follow the clearly erroneous standard and thus give appropriate deference to the factual findings of the District Court and conclusions drawn therefrom. He does not attack the particular legal tests applied by the appellate court in handing down its ruling on the constructive discharge and First Amendment issues. The Court of Appeals admittedly did not specifically cite Rule 52 or the clearly erroneous standard of review. However, Dr. Smith's argument is merely a matter of semantics because the context of the appellate court opinion leaves no doubt as to the factual findings that the court considered necessary to a

decision in this case and the lack of appropriate consideration by the District Court of those facts which had to be the influencing factor for a decision in this case. Reversal was required so as to allow this decision to fit into firmly established precedent. In fact, some circuits have held that the issue of constructive discharge is one of law or at least a mixed question of fact and law. See *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536 (11th Cir. 1987). The instant brief assumes, *arguendo*, that the clearly erroneous standard is appropriate since the error of the District Court's decision is so apparent as to be unable to survive even the more restrictive review.

Rule 52 provides that, "[f]indings of fact shall not be set aside unless clearly erroneous. . . ." This Court has provided guidance on the meaning of that requirement. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564,573 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The Eighth Circuit Court of Appeals applied that standard to the factual findings of the District Court as to the voluntariness of Dr. Smith's separation from the medical staff and to the applicable factual findings in the First Amendment context which did not constitute questions of law.

Several passages from the appellate court opinion are instructive in showing that the restrictive standard was applied. The Court of Appeals began its discussion of the constructive discharge issue by pointing out numerous correspondence and other writings and statements by Dr.

Smith from July 1976 through the date the medical staff issued its *recommendation* that Dr. Smith's staff privileges be *temporarily suspended* (February 1977) in which he stated that he intended to resign from the staff and stop using the Hospital. The court then noted various pieces of correspondence and committee minutes introduced into the record which indicated the Hospital Board of Governors did not accept and act on the recommendation of temporary suspension of privileges but instead considered Dr. Smith on active medical staff until he in effect removed himself from that position by failing to undertake his share of emergency room coverage, failing to attend the requisite number of staff meetings, and failing to submit a written application for written renewal of privileges, all as required by Hospital by-laws. (App. A, pp. 2-10 of Petitioner's Brief) After reviewing these relevant facts, the Court of Appeals noted that the District Court had come to the conclusion that Dr. Smith's privileges had been constructively revoked. The Court of Appeals stated, "We are unable to agree" (App. A, p. 11 of Petitioner's Brief) and then went on to state pertinent facts which could only point to the conclusion the court had reached – obviously implying the court's "definite and firm conviction that a mistake [had] been committed." The court then set forth the legal requirements, pursuant to Eighth Circuit precedent, for a plaintiff to prove constructive discharge and noted, "There is *nothing in the record* which would suggest that the Hospital tried to create intolerable working conditions in order to force Smith to quit. In fact, *it is abundantly clear* that the Hospital and its staff tried to accommodate Smith as much as possible as demonstrated in their continued efforts to

enable Smith to maintain his privileges." (Emphasis added) (App. A, p. 13 of Petitioner's Brief) To find constructive discharge on such a record is clearly erroneous under Eighth Circuit precedent. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1986). How, other than to use the words "clearly erroneous", could the Court of Appeals have made it more evident that, upon a review of the record, it determined there was no evidence to support the District Court finding so that the court was convinced "a mistake had been committed"? Overall impression and intent, readily apparent here, is the touchstone of appropriate application of the proper standard of review, and not semantics.

Dr. Smith in his Brief cites some specific statements by fellow physicians and medical staff members which he says prove they specifically intended to make conditions intolerable. These isolated incidents and off-hand remarks pale in comparison to Dr. Smith's own written statements to his patients, constituents, the Hospital Board, and the county judge, all introduced into the record and to some extent referred to by the Court of Appeals, which were certainly the motivating factors in making working conditions at the Hospital intolerable, if in fact they were. The Eighth Circuit specifically describes certain of these more egregious statements. Dr. Smith cannot complain of intolerable conditions that he himself created and allege constructive discharge.

Dr. Smith states throughout his argument in this petition that the appellate court engaged in *de novo* review of important factual issues. This is apparently because the court failed to specify the standard of review it employed (and had employed on countless previous

occasions – see, e.g., *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668,675 (8th Cir. 1968); *Roberts v. Van Buren Public Schools*, 773 F.2d 949,954 (8th Cir. 1985)) and because the court reversed the District Court. However, a review of the Court of Appeals Opinion with its specific citation of factual evidence reveals how unsupported by the evidence, and of necessity clearly erroneous, the District Court Opinion was.

The review conducted by the Court of Appeals on the First Amendment analysis is even less legally subject to challenge since key issues are questions of law, not fact, thus subject to a much less restrictive standard of review. This court in *Pickering, Mt. Healthy,* and *Connick,* set forth the parameters to be considered where, as here, a public employee is terminated from his employment after an exercise of First Amendment speech rights. Those cases teach that one does not lose First Amendment rights by accepting public employment, but by the same token, one cannot escape, by clothing oneself in the First Amendment, the consequences of intentionally disruptive and vindictive behavior, which impairs the state's interest in providing efficient service. The Court of Appeals here correctly referred to the three step analysis for determination of this issue of the propriety of terminating a government employee after his exercise of free speech rights. The steps are (1) determination of whether the speech is constitutionally protected, i.e., whether it addresses a matter of public concern (determined by considering the content, form, and context) – *Connick*, and the outcome of balancing the interests of the employee as a citizen to comment on matters of public concern and the interest of the state, as employer, in promoting the efficiency of

public services it performs through its employees – *Pickering;* (2) determination of whether the speech was a substantial or motivating factor in the adverse employment decision; and (3) determination of whether the employment action would have occurred even in the absence of the protected conduct. See, e.g., *Lewis v. Harrison School Dist. No. 1,* 805 F.2d 310,313 (8th Cir. 1986) (citing applicable Supreme Court precedent including *Pickering* and *Connick*).

As the Court of Appeals stated in its Opinion in this case, determination of whether speech is constitutionally protected is to be determined as a matter of law. *Connick v. Myers,* 461 U.S. 138,148, n. 7 (1983). The court was thus not bound by the clearly erroneous standard. "[I]n cases raising First Amendment issues, we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' . . . " *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485,499 (1984). "Rule 52(a) does not inhibit an appellate court's power to correct errors of law . . . " *Id.* at 501. The Eighth Circuit Court of Appeals, in conducting its required independent review of this question of law, held that the record, when reviewed in its entirety, showed Dr. Smith's criticism went beyond protected speech and became only caustic personal attacks which disrupted the public service provided by the Hospital. The court noted that the District Court was correct that some of Dr. Smith's complaints were on matters of public concern; however, the lower court stopped there, *assuming* constitutional protection rather than viewing the cumulative effect. The appellate court also held that the District Court committed a mistake in ruling that the remaining steps of the test used

in this First Amendment analysis favored Dr. Smith. In part, those errors were based on the District Court's erroneous conclusion on the initial question of law. The Court of Appeals cited the medical staff resolution itself (Appendix A) and the reasons stated on its face as the basis for the recommendation of temporary suspension of Dr. Smith's privileges as the real motivating factor in the employment decision as opposed to protected First Amendment activities. The Eighth Circuit, in considering the correctness of the District Court's conclusion on the third step (would the Hospital have denied privileges absent First Amendment activities) noted the applicability of the *Pickering* balance, again a legal question, and the overwhelming evidence in the record of the vindictive and personal nature of Dr. Smith's attacks and the apparent disruptive effect on the efficiency of the Hospital and found no support for the lower court's ruling.

CONCLUSION

The Court of Appeals reversed the District Court on nearly every important factual and legal finding. While the appellate court did not specifically state the factual findings were "clearly erroneous" and "a mistake", it did refer to specific evidence in the record, apparently ignored or misconstrued by the District Court, which could lead to no other conclusion than that Dr. Smith voluntarily resigned his staff position and the Hospital and its staff did not act in retaliation to Dr. Smith's public criticisms. Further, the appellate court was faced with a question of law – whether Dr. Smith's speech was constitutionally protected – on which it conducted an independent review and held the District Court's conclusion to be unsupported by applicable legal precedent.

This matter has been correctly determined and no further review is necessary or appropriate. The case simply involves the application of well established precedent to the facts of this case. The decision does not present new or novel twists nor raise an issue on which lower courts and future litigants need guidance. No conflict is alleged nor existing among lower courts as to the applicable rules of law or application thereof. The case was correctly decided applying correct legal standards. Thus, Dr. Smith's request for a Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX A

BUSINESS MINUTES Date February 22, 1977

The Cleburne County Hospital Medical Staff met in a called meeting at 5:30 P.M., Tuesday, February 22, 1977, in the hospital conference room.

Attending were Drs. D. H. McClanahan, R. L. Clark, J. B. Scruggs, M. E. Barnett, W. M. Wells, R. R. Wilson, Max Baldridge, N. L. Poff, H. L. Cranford, and H. C. Williams; and Billie Thurman, A.R.T. Director of Medical Records.

Due to Dr. Smith's absence from the meeting, the recording secretary attempted to locate him at his home, office, and on his beeper to remind him of the meeting of which his office had been informed Friday, February 18, 1977 per the usual channels. The meeting was called for 5:30 P.M., however in deference to Dr. Smith's not being at the meeting at that time, the business at hand was not started until 6:15 P.M.

At that time Dr. Wells called the meeting to order with the following statement:

> "This meeting was called expressly to consider Dr. Smith's allegations regarding the hospital.
>
> The Medical Staff feels that it is unnecessary for the content of this meeting to be made public, and all of us will make every attempt to keep it private.
>
> We should like to begin the meeting with the reading of the following concensus statement:"

The following statement was given to and read by Mrs. Thurman:

"Dr. Smith, the purpose of this meeting is two-fold. The first is to again express to you the disagreement of the staff with your contention that poor medical care is rendered in this hospital, and with your open attack on various individuals associated with the hospital. Your grumblings, as we recall, began some three or four years ago, and consisted for the most part of occasional disagreements with Mr. Barker, who was then administrator of the hospital, and certain individuals on the nursing staff. Since then, you have gradually and sometimes rather explosively expanded the objects of your attack to include the County Judge, the Hospital Administrator, the Board of Directors, the Medical Staff and the Nursing Staff. We choose not to reflect upon the actions of the current County Judge, since he has been in office only slightly more than one month. However, we do feel that the Board of Directors, wholly and as individuals, have done the very best they could with the welfare of the hospital in mind. The Hospital Administrator, although many of us had our doubts at the time of his being hired by the Board, has worked extremely hard and accomplished a great deal in terms of getting the hospital on its feet, from a financial point of view. He, together with the governing Board, has accomplished this in the face of an open attack, which has unquestionably brought the hospital monetary damages during the last few months. The Nursing Staff in this hospital, we believe, consists of individuals with as near an ideal combination of professionalism and neighborly compassion as could be found anywhere. Some problems of morale do exist, but are, with only one or two exceptions, the direct result of criticism levied publicly at them and primarily by you in spite of their attempts to continue to provide good nursing care.

> Now, the second objective of this meeting is for the Medical Staff to respond to your criticism of and recommendations to us. Your implications that this Medical Staff operates deceivingly and wholly for self-interest exceeds the bounds of ethical behavior. We disagree with you that overall poor patient care is found in our hospital, and we emphatically disagree that the Medical Staff itself is substandard. We accept our responsibility as a Medical Staff to ensure that adequate health care is avaliable in our community through the Cleburne County Hospital, and feel that the following recommendation is therefore in order. Many times in recent weeks you have suggested that if the findings of an investigation into the overall functioning of the hospital does not bear out your allegations, then you yourself are the problem at the hospital, and should be removed. We, the Medical Staff, feel that such investigations have been carried out, and that there has been no basis for your claims uncovered. We, therefore, recommend to the Board of Governors that your staff privileges be temporarily suspended. We further intend to ask for consultation from the Ethics Committee of the Arkansas Medical Society. We further plan to request, if possible, a Peer Review of all physicians practicing in this hospital which could result in further recommendations to the Board of Governors."

Dr. Baldridge made a motion to adopt the recommendations as was read to present to the Board of Governors. Dr. McClanahan seconded the motion. Adopted by a unanimous voiced vote. There were no opposing votes.

Dr. Barnett made a motion that a copy of the concensus statement be given to Dr. Smith by hand at the earliest possible date. Dr. Baldridge seconded the motion. This was accepted by a unanimous vote.

A motion to adjourn at 6:30 P.M. was made by Dr. Scruggs and seconded by Dr. Baldridge. Voted and passed. Meeting adjourned.

Respectfully submitted,

/s/ Harrol Crawford

(PX 126)

Supreme Court, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-23

In The

Supreme Court of the United States

October Term, 1988

DR. WAYNE SMITH,

Petitioner,

v.

CLEBURNE COUNTY HOSPITAL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly applied the proper standard of review in reversing the District Court Opinion that Dr. Smith's Hospital staff privileges were constructively revoked in retaliation for exercise of First Amendment rights, where the appellate court did not specifically mention that it applied the clearly erroneous standard to factual findings and where the court held as a matter of law that Dr. Smith's speech activities were beyond the scope of constitutional protection.

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STATEMENT OF THE CASE

Dr. Wayne Smith, a general practice physician, first submitted written application and was accepted on the medical staff of Cleburne County Hospital (Hospital) in 1968. Hospital by-laws provided that the medical staff each year was to submit recommendations to the Hospital Board of Governors as to which physicians, upon submission of written application, should be accepted onto or remain on the medical staff. Membership on the Hospital medical staff, while permitting the physician to admit patients to the Hospital, carried certain responsibilities such as attending monthly staff meetings and providing rotating coverage for the Hospital emergency room.

By the mid 1970's, Dr. Smith had become dissatisfied with the level of care provided by the Hospital and voiced numerous complaints about the way the Hospital was operated by both the administration and the medical and nursing staff. In July 1986, Dr. Smith informed the Hospital Administrator of his intent to resign from the staff and began so informing his patients as well. Dr. Smith drastically reduced his admissions to the Hospital. On November 22, 1976, Dr. Smith wrote the Hospital Board of Governors requesting an investigation of the Hospital and stated he should no longer remain on the staff if such investigation did not bear out his complaints and instead showed him to be the problem. (PX 76) On that same date, Dr. Smith distributed an open letter to his patients complaining of patient care and the operation of the Hospital and indicating his intent to quit using the Hospital and to resign from the staff. (PX 75) On December 20, 1976, the Hospital Board, largely in response to

Dr. Smith's criticisms and public debate, made arrangements for the Arkansas Department of Health to undertake an inspection and evaluation of the Hospital facilities and quality of care. Shortly thereafter, members of the medical staff took out an advertisement in the local newspaper supporting the Hospital and quality of care it provided. Debate concerning the Hospital and Dr. Smith's complaints received wide press coverage and discussion at public forums. During this time period, Dr. Smith was also issuing some rather biting personal attacks against the Hospital Administrator, Board of Governors, and fellow members of the medical staff, both publicly and privately. At the January 3, 1977 medical staff meeting, Dr. Smith indicated he would not be satisfied with an Arkansas Department of Health investigation and that if such investigation found the Hospital provided adequate care, he would be unable to live with his conscience and would resign. (PX 100) The Arkansas Department of Health completed its investigation and submitted the results on February 1, 1977. (PX 108,109) The report noted some deficiencies; Dr. Smith felt the report indicated the Hospital was providing poor care; other physicians felt it was a basically good report. Dr. Smith announced his candidacy for county judge on February 9, 1977 with a platform critical of the Hospital administration and care provided.

At the February 22, 1977 medical staff meeting, a meeting Dr. Smith chose not to attend, the medical staff passed a resolution *recommending* to the Hospital Board of Governors that the Board *temporarily suspend* Dr. Smith's staff privileges since the medical staff felt the Arkansas Department of Health investigation did not support

Smith's claims of improper patient care. (That resolution, PX 126, is attached as Appendix A.) Dr. Smith responded by writing the Hospital Administrator on February 25, 1977 that in light of the medical staff allegations, he had "no choice but to cease hospital activity" until the matter was resolved. (PX 128) The Administrator responded by letter indicating he understood Dr. Smith's letter to be a letter of resignation which he would pass on to the Board. (PX 134) Dr. Smith replied with a letter that same day indicating he had not resigned from the active medical staff. (PX 135) Consequently on March 17, 1977, the Administrator wrote Dr. Smith that the Board considered him to be an active member of the medical staff and reminded him of his obligations to retain that privilege, including emergency room coverage. (PX 138) Dr. Smith responded by letter dated March 18, 1977 that, on advice of counsel, he would not be "actively participating in hospital activities for some time." (PX 139) On March 24, 1977, the Joint Committee which had been appointed by the Board of Governors to look into the controversy acted on the medical staff recommendation by requesting the Professional Relations Committee of the Arkansas Medical Society to investigate the situation. That Arkansas Medical Society committee investigated for a period of time and determined the controversy was a personality conflict and the committee ceased its investigation.

Dr. Smith did not accept further coverage assignments or attend further staff meetings following the medical staff recommendation. After Dr. Smith missed more than four staff meetings, he was taken off the medical staff in accordance with staff by-laws. Dr. Smith was

provided forms necessary to complete his yearly application for renewed staff privileges which were due back by August 20, 1977. All doctors desiring staff privileges were required each year to reapply. Dr. Smith failed to respond, nor did he participate in further Hospital activities.

The next formal activity was a hearing by a Joint Executive Committee of the Hospital in October 1981 at the direction of the District Court on the issue of whether Dr. Smith should be granted renewed staff privileges. The committee heard testimony and determined Dr. Smith should not be granted privileges based on its belief that Dr. Smith's return would be detrimental to the Hospital and the care it provided. The Board accepted the recommendation that Dr. Smith's staff privileges not be renewed.

Trial of this matter was bifurcated by the District Court. Upon completion of the liability phase, the court concluded Dr. Smith's privileges were constructively revoked in retaliation for his exercise of First Amendment rights by the medical staff action in February 1977 and the Board action in November 1981. Following the remedy phase of trial, Dr. Smith was awarded compensatory damages of $15,000.00 for mental anguish, and punitive damages were assessed against individual defendants. Additionally, reinstatement was ordered upon a showing that Dr. Smith met objective criteria for participating on the medical staff. The Eighth Circuit Court of Appeals reversed the liability decision, holding that Dr. Smith voluntarily resigned from the medical staff and that his speech fell outside the scope of constitutionally protected activity.

REASON FOR DENYING THE WRIT

The Eighth Circuit Court of Appeals applied the proper standard of review in reversing the Opinion of the District Court that Dr. Smith's staff privileges were constructively revoked in retaliation for exercise of First Amendment rights. On the issue of constructive revocation, the Court of Appeals, without specifically citing Rule 52 of the Federal Rules of Civil Procedure or the clearly erroneous standard, made it abundantly clear that from a review of the record, it was convinced that a mistake had been made by the District Court in its factual findings and conclusions. The appellate court referred to specific factual matters, either ignored or not given appropriate consideration by the District Court, which made it unmistakably clear that Dr. Smith voluntarily resigned from the medical staff of Cleburne County Hospital and, likewise, the absence of evidence that the medical staff, Hospital Board, or other Hospital representatives deliberately made conditions so intolerable that Dr. Smith could not stay. The appellate court also specifically reversed the District Court as to its First Amendment findings. The Court of Appeals noted that the inquiry as to whether speech is constitutionally protected is a question of law (not subject to the clearly erroneous standard) and held that the District Court failed to take into account that Dr. Smith's complaints evolved into vindictive personal attacks designed to disrupt the functioning of the Hospital rather than comments on matters of public concern. The Court of Appeals held that the District Court erred as a matter of law in automatically affording Dr. Smith's complaints the highest level of First Amendment protection just because they ostensibly concerned

Similarly, under *Pickering* and *Connick* the balancing between the employee's interest in commenting upon matters of public concern and the State's interest in promoting the efficiency of its services imposes upon the appellate court an obligation to exercise its independent judgment. *Connick*, 461 U.S. at 150, n. 10. Again, the Eighth Circuit recognized and applied the proper standard of review in conducting the *Pickering* balancing test. (App. 18-19.)

Finally, the Eighth Circuit's conclusion that Smith's speech was not entitled to First Amendment protection does present any conflict among the circuit courts of appeal. The Eighth Circuit's decision is consistent with the only other circuit court opinion to address a similar issue. *See Davis v. West Community Hospital*, 755 F.2d 455 (5th Cir. 1985) (Physician's complaints, including allegations of poor patient care by physicians and alleged malfeasance by board of directors, held to involve matters of only personal interest as employee, rather than matters of public concern as citizen.)

B. The Court of Appeals implicitly applied the clearly erroneous rule to the constructive discharge issue in finding that there was "no evidence" to support the district court's conclusion.

As set forth above, the Eighth Circuit applied the correct standard of review in reversing the district court's decision that Smith's speech was entitled to First Amendment protection, which obviates the need to reach the

issue posed in the petition. However, even if the merits of petitioner's argument are examined, (and assuming *arguendo* that a finding of constructive discharge is a finding of fact subject to the clearly erroneous standard[3],) the petition should nonetheless be denied. The Eighth Circuit did not usurp the district court's function as fact finder, nor did it simply pronounce fact findings at "polar

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[3] The petition assumes without citation of authority that the district court's finding of constructive revocation is a factual finding. Solely for the limited purpose of responding to the petition, Respondents address the merits of the petition under that assumption. However, this Court has never held that a finding of constructive discharge is a factual finding which may be overturned on appeal only if clearly erroneous. At least two circuit courts of appeal have stated that constructive discharge is a mixed question of law and fact, which broadens the scope of appellate review, *see Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1538 (11th Cir. 1987); while other circuits have held that a constructive discharge is reviewable as a finding of fact. *E.g., Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986). One circuit court has expressed the desire to "avoid the Serbonian bog which appears to encircle the inquiry whether constructive discharge poses solely a question of fact or a mixed question of fact and law." *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). In the absence of a controlling opinion establishing that a constructive discharge finding is purely a finding of fact, Supreme Court review of the present case would necessarily require a determination of this additional unresolved question. If it should be held to be a mixed question of law and fact, there is substantial authority that the finding is independently reviewable by the appellate court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982).

opposite" from the trial court, as Smith suggests.[4] (Pet. 8.) The Eighth Circuit's opinion clearly reflects that the Court considered the district court's finding of constructive revocation to be – at a minimum – clearly erroneous.

Although the Eighth Circuit did not make specific mention of Fed.R.Civ.P. 52(a), the "clearly erroneous" standard, or *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1984), when the Eighth Circuit's opinion is considered in context and in light of the record, the unequivocal, forceful language employed in its unanimous decision leaves no doubt that the Court of Appeals concluded that the district court's finding of constructive discharge was clearly erroneous. To require that the Eighth Circuit reconsider its decision under *Anderson v. City of Bessemer* would be a hollow and futile elevation of form over substance.

The seminal principle on the "clearly erroneous" standard is that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

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[4] Contrary, to Smith's assertions, the Eighth Circuit did not engage in wholesale revisions to the subsidiary findings of fact made by the district court. A comparison of the two opinions reveals a substantial amount of similarity and overlap in the discussion of facts. Indeed, Smith does not attack any specific statements of fact contained in the Eighth Circuit's opinion. The court's differing views involve the application of law to the facts.

The Eighth Circuit's opinion makes clear that their review of the record left the Court with the definite and firm conviction that a mistake had been committed. In reversing the finding of constructive discharge, the Eighth Circuit stated:

> A constructive discharge would occur only if the Hospital rendered Smith's working conditions intolerable in order to force him to quit. [Citation omitted] *There is nothing in the record which would suggest that the Hospital tried to create intolerable conditions in order to force Smith to quit.* In fact, it is abundantly clear that the Hospital and its staff tried to accommodate Smith as much as possible as demonstrated in their continued efforts to enable Smith to maintain his privileges. (Emphasis added.)

(App. 13.) In concluding that there is "nothing in the record" to "suggest" that the defendants sought to render Smith's working conditions intolerable, the Eighth Circuit has more than satisfied the safeguards embodied in the "clearly erroneous" rule. Since there is no evidence to support the district court's finding of constructive discharge, it necessarily follows that the trial court's conclusion was clearly erroneous. If a finding can be clearly erroneous when there is evidence to support it, *United States Gypsum*, 333 U.S. at 395, it necessarily follows *a fortiori* that a finding is clearly erroneous if there is no evidence to support it.

Similarly, for appellate court deference to factual findings, *Anderson v. City of Bessemer* requires that the district court's account of the evidence be plausible in light of the record in its entirety and that there be two permissible views of the evidence. 470 U.S. at 573-4.

Thus, by implication, if the findings drawn by the district court are *not* plausible and if the appellate court concludes there is only *one* permissible view of the evidence, then the district court's findings are clearly erroneous. A fair reading of the Eighth Circuit's unanimous opinion leads to the inescapable conclusion that the appellate court simply found the district court's conclusion of constructive discharge implausible in light of Smith's voluntary withdrawal and the staff's continued efforts to enable Smith to maintain his privileges. (App. 13.)

In concluding that Smith's privileges were constructively revoked, the district court failed to detail the evidentiary support for its finding.[5] (App. 41-42.) Where, as here, a district court fails to enunciate the basic evidentiary support for its findings, a court of appeals cannot say that the finding is plausible and thus not clearly erroneous. *Lopez v. Current Director of Texas Economic Development Comm.*, 807 F.2d 430, 434 n. 3 (5th Cir. 1987).

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[5] The petition erroneously asserts that in support of its liability finding of constructive revocation of staff privileges, the district court made specific findings of fact that the "medical staff . . . made conditions intolerable for Smith and *specifically intended* to make conditions intolerable for Smith, that his subsequent withdrawal was therefore involuntary. . . ." (Emphasis in original.) (Pet. 12.) The only passage of the liability opinion which discusses the finding of constructive revocation makes a conclusory finding that the withdrawal was involuntary. (App. 41-42.) The district court opinion made no factual findings in its liability opinion that Smith's conditions were intolerable nor did it detail any evidentiary support of its conclusion of constructive revocation.

Although the district court made no specific credibility findings, Smith suggests that the constructive discharge finding was implicitly based upon credibility determinations. (Pet. 13). Even if that were true, the Eighth Circuit's reversal on this record would not be prohibited by the "clearly erroneous" standard. Where the story itself is so intentionally inconsistent or implausible on its face that a reasonable factfinder would not credit it, the court of appeals is permitted to find clear error even if a finding purportedly is based on an express credibility determination. *Anderson*, 470 U.S. at 564. Here, the Eighth Circuit conclusion that there was "nothing in the record" to support a finding of constructive revocation and that it was "abundantly clear" that the Hospital and its staff tried to accommodate Smith in their continued efforts to enable him to maintain his privileges reflects the appellate court's conclusion that Smith's testimony that he was forced to resign from the staff is simply implausible and unworthy of belief, notwithstanding any alleged implicit credibility determinations. (App. 13.)

CONCLUSION

In seeking certiorari, Smith advocates a purely mechanical approach to findings of fact and Rule 52(a), which this Court has eschewed, especially in cases under the First Amendment. *See Bose*, 466 U.S. at 499, 501 n. 17. Respondent Board of Governors urges the Court to deny the petition and decline Smith's invitation that the Court deviate from the traditional scope of review in First Amendment cases. If adopted, the petitioner's approach would weaken, if not destroy, the firmly established duty

of an appellate court to make an independent review in First Amendment cases. The Eighth Circuit applied the correct standard of review to decide as a matter of law whether Smith's speech was entitled to First Amendment protection and to resolve the balancing test under *Pickering* and *Connick*. These unassailable holdings are dispositive of the petition.

The Eighth Circuit's opinion with regard to the finding of constructive discharge leaves no doubt that the appellate court was left with the firm and definite conviction that a mistake had been committed. Any oversight by the appellate court in not specifically reciting the "clearly erroneous" standard is rendered harmless by the dispositive ruling that Smith's speech was not protected by the First Amendment and by the Eighth Circuit's express finding that there is "no evidence" to support a finding of constructive revocation.

Accordingly, Respondent Board of Governors respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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